UNPUBLISHED CASES

Not Reported in F.Supp.2d, 2005 WL 1796118 (E.D.N.Y.)
(Cite as: 2005 WL 1796118 (E.D.N.Y.))

Only the Westlaw citation is currently available.

United States District Court,
E.D. New York.
Maria ALMONTE, et al., Plaintiffs,
v.
THE CITY OF LONG BEACH, et al., Defendants.

No. CV 04-4192(JS)(JO).
July 27, 2005.

Louis D. Stober, Stephen G. Walko, Heather Patton, Law Office of Louis D. Stober, Jr., Garden City, NY, for Plaintiffs.

Ronald J. Rosenberg, Rosenberg Calica & Birney LLP, Garden City, NY, Anthony V. Merlino, Thomas J. Donovan, Bee Ready Fishbein Hatter & Donovan, LLP, Mineola, NY, for Defendants.

MEMORANDUM AND ORDER

ORENSTEIN, Magistrate J.

***1** By letter motion dated July 20, 2005, Docket Entry ("DE") 45, the plaintiffs seek to compel defendant Glen Spiritis ("Spiritis") to answer certain questions that he refused to answer on the basis of his invocation of legislative privilege when he was deposed in this action on June 29, 2005. In a responsive letter dated July 25, 2005, counsel for all defendants opposes the application. DE 48. For the reasons set forth below, I now grant the plaintiffs' application.[FN1]

FN1. While this Memorandum and Order was in draft form *in computero*, I became aware that the plaintiffs had submitted a letter in reply, DE 50, to which the defendants in turn responded, DE 51. Because my individual rules prohibit such additional submissions, I have considered neither.

I. *Background*

The general factual and procedural background of this case is set forth in my Memorandum and Order of July 12, 2005, DE 38, with which I assume the reader's familiarity. Additional background information is provided below as relevant. The only matter worth recounting here is the telephone conference that the parties refer to in their letters on the instant application. As the defendants' counsel correctly notes, the parties' counsel did call me on July 1, 2005, to seek a ruling on Spiritis' invocation of legislative privilege at his deposition. Assuming that the parties were acting in accord with the provisions of Local Civil Rule 37.3(b), I initially thought the deposition was proceeding at that time. When counsel revealed that the deposition had concluded earlier in the week, I reminded them of the local rule, informed them that I would make no ruling during the telephone call, and invited them to pursue the matter in an appropriate manner if they so desired. Not having made any ruling and having determined that the proceeding was improper, I made no entry on the docket. I thus treat the telephone call as a nullity that has no bearing on the instant application.

II. *Discussion*

The defendants raise four arguments in support of their contention that Spiritis should be permitted to avoid answering certain questions on the basis of his invocation of privilege: (1) all discovery is currently stayed; (2) the plaintiffs' application, being nine pages long, violates Local Civil Rule 37.3 and Rule III.A of my own individual practice rules; (3) the application "runs afoul of the Individual Defendants' legislative immunity and legislative privilege; and (4) the Individual Defendants did not waive theirs [sic] rights to legislative privilege." DE 48 at 1. I address each argument in turn below.

A. *The Stay Of Discovery*

On July 18, 2005, the parties filed a stipulation and proposed order that would, among other things, stay discovery pending the court's resolution of potentially dispositive motions, and thereafter require the parties to complete discovery within 90 days.

DE 42. I ordered a stay pending resolution of some of the subject motions, and required discovery to be completed 30 days after the lifting of the stay.

The instant application does not strike me as inconsistent with the stay, but instead merely asks me to make a ruling so that the parties can more easily complete discovery on schedule once the stay is lifted. I do not contemplate that Spirits will continue his deposition and answer the questions at issue before the stay is lifted, although I will certainly endorse any application to lift the stay for such purposes should the parties agree to make one.

***2** Further, I ordered the stay based on the parties' stipulation. Any party is free to withdraw from that stipulation and seek to have the stay lifted if it believes its adversary is violating the terms of the parties' agreement. I offer no opinion on whether such relief is warranted under the circumstances, but merely note that the instant ruling does nothing to prejudice such an application.

2. *The Length Of The Plaintiffs' Letter*

Local Civil Rule 37.3(c), in pertinent part, allows the plaintiffs to make the instant application by submitting a "letter not exceeding three pages in length outlining the nature of the dispute and attaching relevant materials." Similarly, Rule III.A.3 of my individual practice rules provides: "All letters submitted pursuant to this rule shall be no longer than three pages in length, exclusive of attachments." The defendants object that the plaintiffs have violated those rules by submitting a letter-motion that is nine pages in length.

The letter-motion from the plaintiffs' counsel consists of two paragraphs of introductory text on the first page, three paragraphs of concluding text spread across the final two pages, and a transcript of the testimony at issue that begins on the first page and ends on the eighth. DE 45. The defendants' objection thus plainly exalts form over substance, in that the exact same application could have been made by placing the transcript of the testimony at issue in an attachment rather than reprinting it in the body of the letter, and the letter would then have been well within the page limits.

I could of course require the plaintiffs to resubmit their motion in a form that complies with the rules, and then further require the defendants to resubmit their response. Such a vindication of the defendants' vigorous policing of rules intended to streamline litigation and ease the burden on courts would simply increase the parties' burden without affecting in the slightest the substance of the arguments presented in support of or in opposition to the instant application. Rather than engage in such a purposeless exercise, I will proceed to the merits.

3. *Legislative Immunity*

Spiritis was the City Manager and not a member of the City Council. Unlike the Council Member defendants, he did not invoke legislative immunity to resist appearing at a deposition altogether. At his deposition, he answered a variety of questions, but declined to answer others on the basis of privilege. In doing so, he did not cite legislative immunity as an independent basis for refusing to answer, *see* DE 45 at 1-8. The objection based on immunity as such has therefore been waived.

Reliance on legislative immunity is in any event misplaced. Counsel argues that legislative immunity extends to "executives, outside the legislative branch of local government, as long as they exercise discretionary functions which fall within the legitimate sphere of legislative-related activities." DE 48 at 2. He goes on to cite several cases, one of which is even controlling authority. *See id.* (quoting *Bogan v. Scott-Harris*, 523 U.S. 44, 55, 118 S.Ct. 966, 140 L.Ed.2d 79 (1988) (non-legislative officials "are entitled to legislative immunity when they perform legislative functions,.... Bogan's actions were legislative because they were integral steps in the legislative process.")).

***3** Without questioning the validity or applicability of the cited authority, I note that the defendants make no effort to show that Spiritis, in the words of *Bogan*, "performs legislative functions" or

took any "actions [that] were legislative because they were integral steps in the legislative process." Indeed, their argument in that regard is unavailing for two reasons. First, they seek to place the burden on the plaintiffs to prove that Spiritis is not entitled to invoke legislative immunity. As it is Spirits who seeks to avoid answering an otherwise appropriate question at a deposition, he bears the burden of persuasion, which in this case means he must point out the evidence in the record that establishes his legislative role.

Second, the defendants do not explain what evidence in the record supports the proposition that Spiritis had a legislative role, as opposed to his executive role as erstwhile City Manager. No such evidence has been brought to my attention. The only evidence of which I am aware that even suggests the possibility that he had a legislative role is his deposition testimony about meetings held at the private home of Charles Theofan, who was then the Long Beach Corporation Counsel, *see* DE 36 at 2, and has since succeeded Spiritis as City Manager. Present at these meetings were three Council Members (defendants Mona Goodman, James P. Hennessy, and Thomas Sofield, Jr.), two officials who were not members of the legislature (Spiritis and Theofan), and one private citizen, James Moriarty, who apparently was a political affiliate of the others. *See id.* Nothing in the record suggests that the meetings were legislative in nature or that they were "integral step in the legislative process." Moriarty's presence suggests otherwise. Legislative and executive officials are certainly free to consult with political operatives or any others as they please, and there is nothing inherently improper in doing so, but that does not render such consultation part of the legislative process or the basis on which to invoke privilege.

4. *Waiver Of Legislative Privilege*

The defendants next take issue with the proposition that, by including Moriarty in their discussions, they waived their legislative privilege. Or at least that is what their counsel's letter purports to do-but in fact it returns once again to the more familiar (albeit still inapposite) subject of immunity. DE 48 at 2-3. Such argument entirely misses the point. If Spiritis, or any other individual defendant, had a legislative privilege, it means they were entitled not to divulge their reasons for supporting or opposing legislation, and not to discuss such matters with outsiders. It does not mean they were entitled to discuss those matters with some outsiders but then later invoke the privilege as to others.

Equally inapposite is the defendants' argument that "the privilege is personal to each legislator" and that "a waiver can only be found if each of the Individual Defendants made an 'explicit and unequivocal renunciation' of the privilege." DE 48 at 3. There are two disturbingly obvious flaws with this argument. First, each individual defendant who was present with Moriarty and discussed assertedly privileged matters with him breeched the privilege. Second, the language about "explicit and unequivocal renunciation" that counsel quotes is taken out of context when applied to the issue of privilege. What the Supreme Court wrote is: "we perceive no reason to decide whether an individual Member may waive the Speech or Debate Clause's *protection against being prosecuted for a legislative act.* Assuming that is possible, we hold that waiver can be found only after explicit and unequivocal renunciation *of the protection.*" *United States v. Helstoski*, 442 U.S. 477, 490, 99 S.Ct. 2432, 61 L.Ed.2d 12 (1979) (emphasis added).[FN2]

> FN2. Less obvious but equally flawed is counsel's argument that the personal nature of the privilege means that each holder of the privilege must waive it before any can testify. As the court reasoned, in language the defendants quote only in part (*see* DE 48 at 3):
>
> > The privilege, however, is personal: it belongs to the individual members of a local legislature, not the municipality as a whole. *See Berkley v. Common Council of the City of Charleston*, 63 F.3d 295,

> 296 (4th Cir.1995) (en banc) (holding that a municipality is not immune from suit based on the actions of the local legislature); *Burtnick [v. McLean,* 76 F.3d 611, 613 (4th Cir.1996)] (indicating that local legislators have a "testimonial privilege" but "[t]his privilege may be waived" by members of the local legislature). It follows, in this case, that it is not up to the Council to assert or waive the privilege; the councilors must do so for themselves. Indeed, even before the Fourth Circuit's en banc ruling in *Berkley*, the District of Maryland held that "[t]he privilege is a personal one and may be waived or asserted by each individual legislator." *[Marylanders For Fair Representation, Inc. v. Schaefer,* 144 F.R.D. 292, 298 (D.Md.1992)]. Accordingly, Helping Hand, like previous litigants before this court, will be "free to notice for deposition individual ... legislators and to require each of those persons to assert the privilege on his own behalf." *Id.* at 299 n. 16.
>
> *A Helping Hand, LLC v. Baltimore County, Md.,* 295 F.Supp.2d 585, 590 (D.Md.2003).

***4** Aside from its misapplication of the language in *Helstoski*, Counsel makes no attempt to support the surprising assertion that a privilege can be waived only through explicit and unequivocal renunciation, and it would be an affectation of research to cite the many cases supporting the general proposition that a privilege can be waived when the parties holding the privilege share their communications with an outsider. With respect to the particular issue of legislative privilege, I am aware of no case law holding that a waiver is effective only if made in the form of an explicit and unequivocal renunciation. To the contrary, it appears that it is the invocation of privilege that must be explicit:

> A member of the general assembly is, undoubtedly, privileged from arrest, summons, citation, or other civil process, during his attendance on the public business confided to him.... But every privileged person must, at a proper time, and in a proper manner, claim the benefit of his privilege. The judges are not bound, judicially, to notice a right of privilege, nor to grant it without a claim. In the present instance, neither the defendant, nor his attorney, suggested the privilege, as an objection to the trial of the cause: and this amounts to a waiver, by which the party is forever concluded.
>
> *Geyer's Lessee v. Irwin,* 4 U.S. 107, 107-08, 4 Dall. 107, 1 L.Ed. 762 (1790); *see also Trombetta v. Board of Educ., Proviso Tp. High School Dist. 209,* 2004 WL 868265, *5 (N.D.Ill. Apr.22, 2004) (legislative privilege "is waivable and is waived if the purported legislator testifies, at a deposition or otherwise, on supposedly privileged matters").

Carried to its logical consequence, the defendants' reasoning would mean that they could invoke legislative privilege to prevent a private citizen such as Moriarty from divulging what they told him, or what he told them, in unofficial conversations in a private home that excluded some of the legislators who purportedly shared in the privilege. The proposition is not only repugnant to the policy of liberal discovery embraced by the Federal Rules of Civil Procedure, but is also one that has been explicitly rejected. *See Cano v. Davis,* 193 F.Supp.2d 1177, 1179 (C.D.Cal.2002) ("The legislative privilege does not bar ... a third party non-legislator, from testifying to conversations with legislators and their staffs.") (citing *Gravel v. United States,* 408 U.S. 606, 629, 92 S.Ct. 2614, 33 L.Ed.2d 583, n.18 (1972)).

Spiritis, who is not a legislator, discussed the events at issue in this case with five other persons, some of whom were not legislators (including one who had no governmental position), to the exclusion of some members of the legislature. It would make a mockery of the concept of legislative privilege to hold that Spiritis could invoke it in these circumstances. Accordingly, once the stay of dis-

covery ends, Spiritis must answer the questions he previously declined to answer on the basis of privilege.

III. *Conclusion*

***5** For the reasons set forth above, the plaintiffs' motion to compel defendant Glen Spiritis to answer certain questions notwithstanding his claim of privilege is GRANTED.

SO ORDERED.

E.D.N.Y.,2005.
Almonte v. City of Long Beach
Not Reported in F.Supp.2d, 2005 WL 1796118 (E.D.N.Y.)

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Only the Westlaw citation is currently available.

United States District Court,
E.D. Wisconsin.
Alvin BALDUS, Carlene Bechen, Elvira Bumpus, Ronald Biendseil, Leslie W. Davis, Iii, Brett Eckstein, Gloria Rogers, Richard Kresbach, Rochelle Moore, Amy Risseeuw, Judy Robson, Jeanne Sanchez–Bell, Cecelia Schliepp, Travis Thyssen, Cindy Barbera, Ron Boone, Vera Boone, Evanjelina Cleerman, Sheila Cochran, Maxine Hough, Clarence Johnson, Richard Lange, and Gladys Manzanet, Plaintiffs,
Tammy Baldwin, Gwendolynne Moore and Ronald Kind, Intervenor–Plaintiffs,
v.
Members of the Wisconsin Government Accountability Board, each only in his official capacity: Michael Brennan, David Deininger, Gerald Nichol, Thomas Cane, Thomas Barland, and Timothy Vocke, and Kevin Kennedy, Director and General Counsel for the Wisconsin Government Accountability Board, Defendants,
F. James Sensenbrenner, Jr., Thomas E. Petri, Paul D. Ryan, Jr., Reid J. Ribble, and Sean P. Duffy, Intervenor–Defendants.
Voces De La Frontera, Inc., Ramiro Vara, Olga Vara, Jose Perez, and Erica Ramirez, Plaintiffs,
v.
Members of the Wisconsin Government Accountability Board, each only in his official capacity: Michael Brennan, David Deininger, Gerald Nichol, Thomas Cane, Thomas Barland, and Timothy Vocke, and Kevin Kennedy, Director and General Counsel for the Wisconsin Government Accountability Board, Defendants.

Nos. No. 11–CV–562, 11–CV–1011.
Dec. 8, 2011.

Brady C. Williamson, Godfrey & Kahn S.C., Madison, WI, Rebecca K. Mason, Godfrey & Kahn S.C., Jacqueline E. Boynton, Law Offices of Jacqueline Boynton, Peter G. Earle, Law Offices of Peter Earle L.L.C., Milwaukee, WI, for Plaintiffs.

Daniel S. Lenz, P Scott Hassett, Lawton & Cates S.C., Madison, WI, for Intervenor–Plaintiffs.

Patrick J. Hodan, Daniel Kelly, Joseph W. Voiland, Reinhart Boerner Van DeurenS.C., Milwaukee, WI, Maria S. Lazar, Wisconsin Department of Justice Office of the Attorney General, Madison, WI, for Defendants.

Kellen C. Kasper, Thomas L. Shriner, Jr., Foley & Lardner L.L.P., Milwaukee, WI, for Intervenor–Defendants.

ORDER

J.P. STADTMUELLER, District Judge.

***1** This matter comes before the court on two separate motions (Docket # 63, # 72) to quash third-party subpoenas issued by plaintiffs to Joseph Handrick and Tad Ottman.

On November 28, 2011, Joseph Handrick was served with a subpoena from the plaintiffs calling for his testimony and production of documents, all related to ongoing pretrial discovery. Mr. Handrick is a lawyer employed with Michael Best & Friedrich, LLP, who was hired by the Wisconsin Legislature ("Legislature") as a consulting expert to provide legal advice related to the development of Wisconsin's redistricting plan, which is now being challenged in this case. In their subpoena, the plaintiffs demand that Mr. Handrick: (1) produce "any and all documents used by you or members of the Legislature to draw the 2011 redistricting maps"; and (2) appear for a deposition on December 1, 2011. (Docket # 64, Ex. 1).

Several days later, on December 4, 2011, Tad Ottman, a legislative aide to Wisconsin State Senate Majority Leader Scott L. Fitzgerald, was served with a subpoena by the plaintiffs. That subpoena requested: (1) "any and all documents, electronically

stored information, and tangible things used by you or members of the Legislature to draw the 2011 redistricting maps"; and (2) that Mr. Ottman appear for a deposition on December 7, 2011.

The Wisconsin Assembly and Senate (the "non-parties") have moved to quash both Mr. Handrick's and Mr. Ottman's respective subpoenas. Having received the plaintiffs' brief opposing the non-parties' motion to quash Mr. Handrick's subpoena, the Court believes it has received sufficient briefing to render its decision on both of the non-parties' motions. For the reasons which follow, the non-parties' motions to quash will be denied.

The information the plaintiffs seek from both Mr. Handrick and Mr. Ottman is relevant. In this case, the plaintiffs make claims under both the Voting Rights Act and the Equal Protection Clause. *(See* Docket # 12). And, as the plaintiffs correctly point out, proof of a legislative body's discriminatory intent is relevant and extremely important as direct evidence in both types of claims. (Pl.'s Br. Opp. Mot. Quash, 2–3 (citing *Village of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 265–66, 97 S.Ct. 555, 50 L.Ed.2d 450 (1977), *Comm. for a Fair & Balanced Map v. Ill. State Bd. of Elections*, No. 11–CV–5065, 2011 U.S. Dist. LEXIS 117656, at *11, 2011 WL 4837508 (N.D.Ill. Oct. 12, 2011))). Thus, any documents or testimony relating to how the Legislature reached its decision on the 2011 redistricting maps are relevant to the plaintiffs' claims as proof of discriminatory intent.

From the record before the court, it is apparent that attorney-client privilege has no application to the communications between the Legislature and Mr. Handrick. To be sure, the attorney-client privilege protects communications made from a client to an attorney who is acting as an attorney, but does not cover communications seeking only consulting service. *See Sandra T.E. v. S. Berwyn Sch. Dist. 100*, 600 F.3d 612, 618 (7th Cir.2009), *In re Grand Jury Proc.*, 220 F.3d 568, 571 (7th Cir.2000). Despite Mr. Handrick's being a lawyer, the defendants state that he performed consulting work in connection with the redistricting legislation. (Defs.' Mot. Quash Handrick, 2) (stating "Handrick provided consulting services in connection with the undersigned firm's representation of the State Senate and State Assembly."). Because, as the defendants acknowledge, Mr. Handrick acted as a consultant, the Court finds that his communications are not covered by attorney-client privilege.

***2** Similarly, legislative privilege does not protect any documents or other items that were used by the Legislature in developing the redistricting plan. First, and most importantly, the Court finds it all but disingenuous for the Legislature to argue that these items be subject to privilege in a Court proceeding determining the constitutionality of the Legislature's actions, when the Legislature clearly did not concern itself with maintaining that privilege when it hired outside consultants to help develop its plans. The Legislature has waived its legislative privilege to the extent that it relied on such outside experts for consulting services. *Comm. for a Fair & Balanced Map*, 2011 U.S. Dist. LEXIS 117656, at *35, 2011 WL 4837508. And, even without that waiver, the Court would still find that legislative privilege does not apply in this case. Legislative privilege is a qualified privilege that can be overcome by a showing of need. *Id.*, at *24–*25. Allowing the plaintiffs access to these items may have some minimal future "chilling effect" on the Legislature, but that fact is outweighed by the highly relevant and potentially unique nature of the evidence. *Id.*, at *25–*26. Additionally, given the serious nature of the issues in this case and the government's role in crafting the challenged redistricting plans, the Court finds that legislative privilege simply does not apply to the documents and other items the plaintiffs seek in the subpoenas they have issued. *Id.*

The remainder of the non-parties' arguments, all of which are procedural, fail or can easily be cured. As the plaintiffs correctly note, Mr. Handrick was not employed by a *party* to this case, but instead by the Legislature, and he is, therefore,

not excused from testifying under Rule 26(b)(4)(D). Fed.R.Civ.P. 26(b)(4)(D) (limiting a party's ability to depose "an expert who has been retained or specifically employed by another party in anticipation of litigation ...").

Next, while the initial subpoenas provided a potentially-inadequate time to comply under Rule 45(c)(2)(B), that problem has been substantially cured by the Court's delay while awaiting briefs. Having missed both requested deposition dates, the plaintiffs will now have to reschedule those depositions for a later time. Given the expedited schedule in this case, it is important for the parties to have a shortened turnaround between the issuance of a subpoena and the requested date for production and deposition. The Court notes that three days may be an excessively quick turnaround, however, in the future—except in an extraordinary circumstance—it will not find a *five-day* compliance interim to be unreasonable. The Court also adds that it is apparent that the Legislature has had a hand in causing the three-day interims by apparently refusing to accept service on behalf of its staff and consultants. Considering the need for a quick turnaround in this case, the Court fully expects that the Legislature and its staff, consultants, and members, will cooperate with the efforts of the Court and the parties to expeditiously complete discovery.

***3** Finally, the plaintiffs' overly-broad production requests and failure to include a recording method may easily be cured. Perhaps as a result of oversight, the plaintiffs may have omitted phrases limiting their discovery requests to documents in Mr. Handrick's and Mr. Ottman's "possession, custody, or control." Accordingly, the Court would suggest that they modify their subpoenas so as to limit their requests and, at the same time, modify the subpoenas to specify the recording method for taking depositions.

Provided the plaintiffs make those changes, the Court finds no reason to quash the subpoenas the plaintiffs have issued to Mr. Handrick and Mr. Ottman. Therefore, the non-parties' motions to quash will be denied.

The Court also recommends that all parties (and non-parties) who consider filing motions to quash read very carefully *Committee for a Fair & Balanced Map*, which the Court has cited extensively in this order. The opinion and order in that case addresses head-on many of the issues raised by the non-parties in their motions to quash. Had the non-parties been aware of that case, perhaps they would not have filed their motions to quash or may have tailored their arguments more effectively. Thus, in this instance the Court will not grant costs and attorneys' fees to the plaintiffs for their defense against these motions.

However, having now brought that case to the non-parties' attention, it should go without saying that the Court will not hesitate to award costs together with actual attorneys' fees related to defending future motions to quash, if the Court deems those motions frivolous or otherwise made in bad faith.

Accordingly,

IT IS ORDERED that the non-party movants' motion to quash the plaintiffs' subpoena issued to Joseph Handrick (Docket # 63) be and the same is hereby **DENIED;**

IT IS FURTHER ORDERED that the non-party movants' motion to quash the plaintiffs' subpoena issued to Tad Ottman (Docket # 72) be and the same is hereby **DENIED,** and

IT IS FURTHER ORDERED that the plaintiffs shall redraft and reissue subpoenas to Joseph Handrick and Tad Ottman which correct any issues related to the overbreadth or recording method attendant to their discovery requests.

E.D.Wis.,2011.
Baldus v. Brennan
Not Reported in F.Supp.2d, 2011 WL 6122542 (E.D.Wis.)

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Not Reported in F.Supp.2d, 2011 WL 666326 (N.D.W.Va.)
(Cite as: 2011 WL 666326 (N.D.W.Va.))

Only the Westlaw citation is currently available.

United States District Court,
N.D. West Virginia.
Michael & Tiffany FRYE, Plaintiffs,
v.
DAN RYAN BUILDERS, INC., Frall Foundation Coating, Inc., Aluminators, Inc., and Richard B. Stine, Inc., Defendants.

Civ. Action No. 3:10–cv–39.
Feb. 11, 2011.

Kirk H. Bottner, Law Office of Kirk H. Bottner PLLC, Charles Town, WV, for Plaintiff.

Susan R. Snowden, Martin & Seibert, LC, Jeffrey W. Molenda, Pullin Fowler Flanagan Brown & Poe PLLC, Martinsburg, WV, John O. Easton, Jordan, Coyne & Savits, LLP, Fairfax, VA, Kenneth Hopper, Pullin Fowler Flanagan Brown & Poe PLLC, Morgantown, WV, for Defendant.

MEMORANDUM OPINION AND ORDER GRANTING, AS FRAMED, DEFENDANT, DAN RYAN BUILDERS', INC. AND INTERESTED PARTY, BOWLES RICES' MOTION TO QUASH AND/OR MODIFY SUBPOENA

JAMES E. SEIBERT, United States Magistrate Judge.

***1** This matter comes before the Court on Bowles, Rice, McDavid, Graff & Love LLP's (hereinafter "Bowles Rice") Motion to Quash Subpoena Duces Tecum and Defendant, Dan Ryan Builders's, Inc., Motion to Quash and/or Modify Plaintiffs' Subpoena Duces Tecum both filed November 23, 2010.[FN1] The Court held an evidentiary hearing and argument on both motions on January 5, 2011. Plaintiffs, Michael and Tiffany Frye, appeared by Kirk H. Bottner, Esq. by telephone. Defendant, Dan Ryan Builders, Inc. (hereinafter "DRB"), appeared by Susan R. Snowden, Esq., in person. Interested Party, Bowles, Rice, appeared by William J. Powell, Esq., in person. Defendant, Richard B. Stine, Inc., appeared by Jeffrey W. Molenda, Esq., by phone. Defendant, Frall Foundation Coating, Inc., appeared by John O. Easton, Esq., by phone. The testimony of Tracey A. Rohrbaugh, Esq. was taken and Bowles Rice tendered Exhibit 1 the "Informed Consent," which was admitted into evidence. No other testimony was taken nor was any other evidence adduced.

FN1. Dkt. Nos. 66 & 67, respectively.

I. *INTRODUCTION*

A. *Background*

This action was initially filed on March 5, 2010 in the Circuit Court of Berkeley County, West Virginia alleging breach of contract violations arising out of alleged negligent construction of a home. Defendants timely removed the litigation pursuant to 28 U.S.C. § 1441(a) by alleging diversity jurisdiction.[FN2] DRB and Bowles Rice filed their Motions requesting the Court to quash or, alternatively, to modify the subpoena served upon Bowles Rice.

FN2. Dkt. No. 1.

B. *The Motions*

Bowles Rice's Motion to Quash Supoena Duces Tecum.[FN3]

FN3. Dkt. No. 66.

DRB's Motion to Quash and/or Modify Plaintiffs' Subpoena Duces Tecum.[FN4]

FN4. Dkt. No. 67.

C. *Decision*

Defendant, Dan Ryan Builders's, Inc., Motion to Quash and/or Modify Plaintiffs' Subpoena Duces Tecum is ***GRANTED AS FRAMED*** because execution of the 2001 Informed Consent Agreement did not, in subsequent litigation filed years later alleging defective construction, waive the attorney-client privilege and work product doctrine protections,

as to the subsequent litigation.

Bowles Rice's Motion to Quash is also ***GRANTED AS FRAMED*** for the same reasons.

II. *FACTS*

1. On November 23, 2010, Bowles Rice filed its Motion to Quash Subpoena Duces Tecum.[FN5]

FN5. Dkt. No. 66.

2. DRB also filed its Motion to Quash and/or Modify Plaintiffs' Subpoena Duces Tecum on November 23, 2010.[FN6]

FN6. Dkt. No. 67.

3. The Court entered an Order on November 30, 2010 setting an evidentiary hearing and argument on both Motions.

4. Bowles Rice filed a Motion to Continue the Evidentiary Hearing on December 3, 2010, and such Motion was granted on December 6, 2010.[FN7]

FN7. Dkt. Nos. 72 & 74, respectively.

5. Plaintiffs filed their Memorandum in Response to Bowles Rice's Motion on December 3, 2010.[FN8]

FN8. Dkt. No. 73.

6. Plaintiffs filed their Memorandum in Response to DRB's Motion on December 7, 2010.[FN9]

FN9. Dkt. No. 75.

7. DRB filed its Reply to Plaintiffs' Response in Opposition on December 9, 2010.[FN10]

FN10. Dkt. No. 76.

***2** 8. Bowles Rice filed its Reply to Plaintiffs' Response on December 10, 2010.[FN11]

FN11. Dkt. No. 77.

9. On January 5, 2011, the evidentiary hearing and argument was held.

10. Tracey A. Rohrbaugh, Esq., testified that she, through her employment at Bowles Rice, entered into an attorney-client relationship with Dan Ryan Builders as its attorney in approximately 2009. Ms. Rohrbaugh testified she became aware of a real estate closing that was handled by Bowles Rice on behalf of DRB and Plaintiffs subsequent to that engagement by DRB. Ms. Rohrbaugh further asserted that a deceased member of her firm conducted the real estate closing and that the civil action currently filed by Plaintiffs is unrelated to the 2001 real estate closing. Ms. Rohrbaugh stated the Bowles Rice firm considered the representation of the matter of the Fryes concluded in 2001 and, therefore, the real estate closing file was closed in that year. Additionally, Bowles Rice, through counsel, relayed that it did not object to any part of its file or any testimony under a subpoena related to the original real estate transaction being disclosed.

III. *DRB MOTION TO QUASH AND/OR MODIFY THE SUBPOENA AND BOWLES RICE'S MOTION TO QUASH THE SUBPOENA*

A. *Contentions of the Parties*

1. Bowles Rice's Motion to Quash Supoena Duces Tecum

Bowles Rice advances two arguments in support of its Motion to Quash. It argues the "subpoena duces tecum improperly seeks communications protected by the attorney-client privilege...." *See* Bowles Rice's Mot., Pg. 7 (Dkt.66). Particularly, Bowles Rice contends "[d]uring the course of its representation of DRB, Bowles Rice has received confidential communications from DRB and its agents for the purpose of seeking legal advice" and "there has been no express or implied waiver of the attorney client-privilege with respect to these communications." *Id.* at 8. Bowles Rice asserts "Plaintiffs' argument that by signing an informed consent form [ ] effectively waived [DRB's] attor-

ney-client privilege with Bowles Rice for all future proceedings, including litigation, defies logic and has no merit." *Id.* at 9. Bowles Rice also argues the subpoena must be quashed because it seeks production of information protected by the work product doctrine. Bowles Rice contends Plaintiffs' "only seek protected work-product of Bowles Rice for which [Plaintiffs] could not have substantial need." *Id.* at 12. Therefore, Bowles Rice requests the subpoena be quashed.

In response, Plaintiffs argue "Bowles Rice cannot now attempt to assert the very privileges that they [sic] themselves [sic] informed the parties to this case would be waived and inapplicable." *See* Pls.' Resp., Pg. 4 (Dkt.73). Plaintiffs also contend Rule 45 of the Federal Rules of Civil Procedure does not support Bowles Rice's position because a "waiver is contained in the Informed Consent to Representation Agreement" and "[DRB] knowingly consented after consultation and [after] being informed of its right to consult with a lawyer of their [sic] own choosing about the legal effect of the [Agreement], to voluntarily waive any rights of confidentiality between the parties to the real estate transaction in the event a future dispute arose." *Id.* at 5–6. Plaintiffs assert they are "entitled to information that would be considered attorney work product because [it] was knowingly prepared as the result of an improper and prohibited legal representation contrary to a contract with a former client and contrary to the interests of a former client." *Id.* at 11. Consequently, Plaintiffs request the Court to deny Bowles Rice's Motion to Quash.

***3** In its Reply, Bowles Rice maintains its argument that DRB's attorney-client privilege is still intact because the Informed Consent language creates only a "narrowly tailored waiver of the attorney-client privilege" and "only applies to confidences shared among the parties to the transaction ... that took place *during the real estate transaction eight years ago.*" *See* Bowles Rice's Reply, Pg. 3 (Dkt.77) (emphasis in original). Bowles Rice also argues "the subpoena decus [sic] tecum runs afoul of the work product doctrine by demanding the mental impressions of Bowles Rice in the form of its selections and organization in its command for production of 'all records or information that would be considered work product.' " *Id.* at 6. Lastly, Bowles Rice contends it has a duty to invoke the attorney-client privilege under Rule 1.6 of the West Virginia Rules of Professional Conduct.

2. DRB's Motion to Quash and/or Modify Plaintiffs' Subpoena Duces Tecum

In support of its Motion, DRB proffers three arguments. First, DRB argues the issued subpoena should be "quashed or modified by this Court as [sic] it is clearly invasive of the attorney-client privilege." *See* DRB's Mot., Pg. 5 (Dkt.67). Specifically, DRB argues that "documents exchanged between Bowles [Rice] and DRB,..were authored or received by counsel in the scope of representation, dealt with the subject of representation, and were generated with a mutual expectation of confidentiality." *Id.* 6. Second, DRB contends that the "documents requested by the subpoena duces tecum are protected from compelled disclosure as attorney work product." *Id.* at 7. Lastly, DRB argues that because the subpoena is without temporal and substantive limitations it "should be quashed or modified as it is overly broad and seeks to compel the production of irrelevant documents." *Id.* at 8.

In opposition, Plaintiffs argue the subpoena, as issued, "does not improperly seek communications that are protected by attorney-client privilege as [sic] there was a waiver by [DRB]." *See* Pls.' Resp., Pg. 6 (Dkt.75). Plaintiffs contend that the language of the "Informed Consent Agreement" signed in 2001, does not indicate that "the waiver only applies to communications or actions that occurred during the [real estate] closing." *Id.* at 7. Plaintiff adamantly asserts that "the plain language of the consent agreement clearly states that no communications to [Bowles Rice] will be confidential." *Id.* Accordingly, Plaintiff states that "[DRB] knowingly gave up this right to refuse to disclose the requested information when it signed the Informed

Consent to Representation Agreement." *Id.* at 12. Plaintiffs counter DRB's second argument by asserting Plaintiffs "are entitled to information that would be considered attorney work product because the work product was knowingly prepared as the result of an improper, prohibited and fraudulent legal representation contrary to a contract with a former client and contrary to the interests of a former client." *Id.* at 16. Plaintiffs also argue the subpoena is limited in time and in subject matter to information relevant to the case, therefore, DRB's Motion should be denied.

***4** In its Reply, DRB "confirms its assertion of the attorney-client privilege as to any communications associated with the instant litigation." *See* DRB's Reply, Pg. 1–2 (Dkt.76). DRB contends no waiver of the attorney-client privilege occurred because, under West Virginia law, "waiver requires the voluntary relinquishment of a known right ... [and] at no time [did] DRB voluntarily relinquish[ ] the privilege as it applied to this litigation." *Id.* DRB contends the execution of the "Informed Consent to Representation Agreement" did not constitute a voluntary relinquishment of the privilege relating to the current litigation. Moreover, DRB argues it had "an expectation that communications between it and its counsel, associated with the present suit" fell outside of the "Informed Consent to Representation Agreement's" scope. *Id.* at 2.

B. *Discussion*

Rule 45 of the Federal Rules of Civil Procedure governs the issuance of subpoenas. Fed.R.Civ.P. 45(a)(1)(A)(iii) requires the production of documents within a subpoenaed party's possession, custody, or control. A person in responding to a subpoena duces tecum, however, may invoke privilege. Fed.R.Civ.P. 45(c)(3)(A)(iii) specifically provides "on timely motion, the issuing court must quash or modify a subpoena that requires disclosure of privileged or other protected matter, if no exception or waiver applies." The party claiming the privilege has the burden of establishing the essential elements of the privilege. *United States v. Construction Prods. Research,* 73 F.3d 464, 473 (2d Cir.1996). Furthermore, Rule 45(d)(2) requires that the party claiming a privilege prepare a privilege log detailing "the nature of the documents, communications, or things not produced that is sufficient to enable the demanding party to contest the claim." Fed.R.Civ.P. 45(d)(2). Failure to submit a privilege log may be deemed a waiver of the underlying privilege claim. *In re Grand Jury Subpoena,* 274 F.3d 563, 576 (1st Cir.2001).

In terms of claiming privilege, in diversity cases such as this one, the Court applies state law to issues concerning attorney client privilege and federal law to assertions of the work product doctrine. *Nicholas v. Bituminous Cas. Co.,* 235 F.R.D. 325, 329 n. 2 (N.D.W.Va.2006).

The West Virginia Supreme Court of Appeals has held there are three elements necessary to the assertion of privilege: "(1) both parties must contemplate that the attorney-client relationship does or will exist; (2) the advice must be sought by the client from the attorney in his capacity as a legal advisor; (3) the communication between the attorney and client must be intended to be confidential." *State ex rel. Med. Assur. of W. Va., Inc. v. Recht,* 213 W.Va. 457, 466, 583 S.E.2d 80, 89 (2003).

The work product doctrine protects the work of the attorney done in preparation for litigation. Fed.R.Civ.P. 26(b)(3). Not even the most liberal of discovery theories can justify unwarranted inquiries into the files and mental impressions of an attorney. *Hickman v. Taylor,* 329 U.S. 495, 510, 67 S.Ct. 385, 91 L.Ed. 451 (1947). The Fourth Circuit has described the work product doctrine as follows:

> ***5** Under the work product rule, an attorney is not required to divulge, by discovery or otherwise, facts developed by his efforts in preparation of the case or opinions he has formed about any phase of the litigation ... fact work product is discoverable only upon a showing of both a substantial need an an inability to secure the substantial equivalent of the materials by alternate means

> without undue hardship. Opinion work product is even more carefully protected, since it represents the thoughts and impressions of hte attorney ... an attorney's thoughts are inviolate, ... and courts should proceed cautiously when requested to adopt a rule that would have an inhibitive effect on an attorney's freedom to express and record his mental impressions and opinions without fear of having these impressions and opinions used against the client. As a result, opinion work product enjoys nearly absolute immunity and can be discovered only in very rare and extraordinary circumstances.

Chaudhry v. Gallerizzo, 174 F.3d 394, 403 (4th Cir.1999).

"In showing a substantial need for fact work product, the movant must specifically articulate the necessity for the documents or other tangible things ... and must also demonstrate why or how alternative sources for obtaining the substantial equivalent are unavailable." *Tustin v. Motorists Mutual Insurance Co.*, 5:08–cv–111, 2009 U.S. Dist. LEXIS 4853, at *13–14 (N.D.W.Va. Jan. 23, 2009). A non-exhaustive list of factors to be assessed in determining substantial need includes: 1) the importance of the materials to the party seeking them for case preparation; 2) the difficulty the party will have obtaining them by other means; and 3) the likelihood that the party, even if he obtains the information by independent means, will not have the substantial equivalent of the documents he seeks. Fed.R.Civ.P. 26(b)(3), advisory committee's note, 1970 Amendments.

When a party refuses to produce documents during discovery on the basis that they are privileged or protected, it has a duty to particularize that objection within the 30–day time period provided for discovery responses. Fed.R.Civ.P. 26(b)(5) (2010); Fed.R.Civ.P. 34(b)(2). To qualify as privileged work product, the document must be prepared "because of the prospect of litigation when the preparer faces an actual claim or a potential claim following an actual event or series of events that reasonably could result in litigation. *National Union Fire Ins. Co. of Pittsburgh, Pa. v. Murray Sheet Metal Co., Inc.*, 967 F.2d 980, 984 (4th Cir.1992). The burden is on the party resisting discovery to show that the documents are protected. *See United States v. (Under Seal)*, 748 F.2d 871, 876 (4th Cir.1984). LR Civ. P. 26.04, in relevant parts, also provides:

> (a)(1) *Waiver:* Objections to disclosures or discovery that are not filed within the response time allowed by the Federal Rules of Civil Procedure, the scheduling order(s), or stipulation of the parties pursuant to Fed.R.Civ.P. 29, whichever governs, are waived unless otherwise ordered for good cause shown.
>
> ***6** (a)(2)(i)(A) *Claims of Privilege:* Where a claim of privilege is asserted in objecting to any means of discovery or disclosure including, but not limited to, a deposition, and an answer is not provided on the basis of such assertion [t]he attorney asserting the privilege shall identify the nature of the privilege (including work product) that is being claimed and, if the privilege is governed by state law, indicate the state's privilege rule being invoked and certify the attorney had reviewed each document for which privilege is asserted
>
> LR Civ. P. 26.04(a)(1), (2)(i)(A).

"As the attorney-client privilege and the work product exception may result in the exclusion of evidence which is otherwise relevant and material and are antagonistic to the notion of the fullest disclosure of the facts, courts are obligated to strictly limit the privilege and exception to the purpose for which they exist." *State ex. rel. United States Fidelity and Guar. Co. v. Canady*, 194 W.Va. 431, 438, 460 S.E.2d 677, 684 (1995). The person asserting the privilege has the burden of showing it applies. *Id.*

Initially, the Court notes that both DRB's and Bowles Rice's Motions are jointly considered be-

cause of the similarity of the parties' positions.

The parties in this case do not agree as to the scope of the waiver language in the Informed Consent to Representation of all Parties Real Estate Transaction/Loan document (hereinafter "the Agreement") which was executed in 2001. The waiver language in dispute is as follows:

> Paragraph 2. Among the parties, no communications to the firm will be considered confidential. However, all such communications will be kept confidential with respect to anyone not a party to the transaction. Should a dispute arise, a member of the firm may be called as a witness by any of the parties to testify about any conversation or actions with [sic] took place concerning this real estate transaction.

See DRB's Mot., Exhibit A (Dkt.75–1).

Plaintiffs argue the plain language of the Agreement regarding the waiver of confidentiality is "very broad and contains no time limitations or any other limitations of any kind." *See* Pls.' Resp., Pg. 2 (Dkt.75). In contrast, DRB and Bowles Rice argue the Agreement was limited to documents and communications disclosed in solely the real estate transaction which occurred on December 20, 2001. Plaintiffs' interpretation of the waiver language is unrealistic. Plaintiffs, additionally, make much ado about Bowles Rice's and DRB's perpetuation of a fraud upon Plaintiffs by failing to disclose the long-standing history between Bowles Rice and DRB.

Notwithstanding Plaintiffs' complaints, the issue before the Court is: whether the Agreement, as executed in 2001, effectively renounced DRB's right to protection from disclosure under the attorney-client privilege and work product doctrine ten years later. The Court is inclined to disagree with Plaintiffs' position because Plaintiffs take far too broad a stance to uphold. First, the Agreement was executed in 2001 to provide informed consent to both the Plaintiffs, as well as, DRB that Bowles Rice would be the real estate attorney in that particular *real estate transaction.* (emphasis added). The waiver language contained in the Agreement is independent from Bowles Rice's ten-year-later representation of DRB. Second, while the waiver language exists, the Court finds the Agreement does not transcend the boundaries of the real estate closing so as to waive the attorney-client privilege and work product doctrine protections afforded to DRB in the current dispute. DRB sought legal advice from Bowles Rice regarding the dispute about the construction of the home in question. Both DRB and its attorney from Bowles Rice, Ms. Rohrbaugh, contemplated that the attorney-client relationship existed and intended their communications to be confidential. There has been no current express or implied waiver of this privilege and, accordingly, Plaintiffs' argument in this regard must fail. *See In re von Bulow*, 828 F.2d 94, 100 (2d Cir.1987) (finding administration of privilege in courts requires recognition that 'sound legal advice or advocacy serves public ends and that such advice or advocacy depends upon the lawyer's being fully informed by the client.") (quoting *Upjohn Co. v. United States*, 449 U.S. 383, 389, 101 S.Ct. 677, 66 L.Ed.2d 584 (1981)).

***7** Plaintiffs' argument regarding waiver of the work product doctrine protection similarly falters from the same deficiencies. Plaintiffs contend the attorney work product should be produced because it was "knowingly prepared as the result of an improper and prohibited legal representation...." *See* Pls.' Resp., Pg. 11 (Dkt.5). Both DRB and Bowles Rice assert Plaintiffs seek protected documents and, that although the protection is not absolute, Plaintiffs have not shown the requisite substantial need to gain access to such documents. Here again, the Agreement was limited in scope to that particular real estate transaction which occurred on December 20, 2001. The Court finds there has been no express or implied waiver of this protection by DRB's execution of the Agreement. Therefore, the attorney work product protection as to the current dispute is intact. Bowles Rice and DRB, however, are not in full compliance with the Federal Rules of

Civil Procedure. Rule 45(d)(2)(A)(ii) requires one withholding subpoenaed information under a claim that it is privileged "to describe the nature of the withheld documents, communications, or tangible things in a manner that, without revealing information itself privileged or protected, will enable the parties to assess the claim." In this case, neither Bowles Rice nor DRB have prepared a privilege log as required under Fed.R.Civ.P. 45(d)(2). This is the rare exception, however, which proves the rule. Here, there are two separate and distinct files: 1) the 2001 real estate file and 2) the file related to this litigation. There is no attorney-client privilege or work product doctrine in the real estate closing file. Both attorney-client privilege and work product doctrine are in the entire litigation file. Therefore, in this one-of-a-kind situation, no privilege log is necessary.

C. *Decision*

Defendant, Dan Ryan Builders's, Inc., Motion to Quash and/or Modify Plaintiffs' Subpoena Duces Tecum is ***GRANTED*** as follows: all documents related to the 2001 real estate transaction shall be produced. No documents related to the representation of DRB by Bowles Rice in this litigation shall be produced.

Bowles Rice's Motion to Quash is also ***GRANTED*** as follows: all documents related to the 2001 real estate transaction shall be produced. No documents related to the representation of DRB by Bowles Rice in this litigation shall be produced.

Filing of objections does not stay this Order.

Any party may, within fourteen (14) days after being served with a copy of this Order, file with the Clerk of the Court written objections identifying the portions of the Order to which objection is made, and the basis for such objection. A copy of such objections should also be submitted to District Court Judge of Record. Failure to timely file objections to the Order set forth above will result in waiver of the right to appeal from a judgment of this Court based upon such Order.

***8** The Clerk of the Court is directed to transmit a copy of this Order to parties who appear *pro se* and any counsel of record, as applicable.

IT IS SO ORDERED.

N.D.W.Va.,2011.
Frye v. Dan Ryan Builders, Inc.
Not Reported in F.Supp.2d, 2011 WL 666326 (N.D.W.Va.)

END OF DOCUMENT

--- F.Supp.2d ----, 2014 WL 1873267 (E.D.Va.)
(Cite as: 2014 WL 1873267 (E.D.Va.))

Only the Westlaw citation is currently available.

United States District Court, E.D. Virginia, Richmond Division.
Dawn Curry PAGE, et al., Plaintiffs,
v.
VIRGINIA STATE BOARD OF ELECTIONS, et al., Defendants.

Civil Action No. 3:13cv678.
Signed May 8, 2014.

Background: Voters sued Virginia State Board of Elections, board members, and Attorney General of Virginia, claiming equal protection violation due to alleged racial gerrymander of Virginia congressional district during redistricting cycle. After dismissal of Board and Attorney General by consent of parties and intervention by Virginia's Republican congressional delegation as defendants, motion to quash subpoenas was filed by non-party former executive director of and counsel to Virginia House Republican Caucus, working as independently contracted legislative consultant on redistricting efforts for Republican members of Virginia House of Delegates.

Holding: The District Court, Robert E. Payne, Senior District Judge, held that legislative privilege did not apply to legislative consultant independently contracted by partisan political party.

Motion denied in part.

West Headnotes

[1] Privileged Communications and Confidentiality 311H 1

311H Privileged Communications and Confidentiality
311HI In General
311Hk1 k. In General. Most Cited Cases

Privileged Communications and Confidentiality 311H 11

311H Privileged Communications and Confidentiality
311HI In General
311Hk11 k. Construction in General. Most Cited Cases

Testimonial and evidentiary privileges exist against the backdrop of the general principle that all reasonable and reliable measures should be employed to ascertain the truth of a disputed matter; therefore, privileges are strictly construed and accepted only where the public good associated with the exclusion of relevant evidence overrides the general principle in favor of admission.

[2] Privileged Communications and Confidentiality 311H 26

311H Privileged Communications and Confidentiality
311HI In General
311Hk24 Evidence
311Hk26 k. Presumptions and Burden of Proof. Most Cited Cases

A party asserting privilege has the burden of demonstrating its applicability to a communication.

[3] Privileged Communications and Confidentiality 311H 27

311H Privileged Communications and Confidentiality
311HI In General
311Hk24 Evidence
311Hk27 k. Weight and Sufficiency. Most Cited Cases

A conclusory assertion of privilege is insufficient to establish a privilege's applicability to a particular document; thus, the proponent of a privilege must demonstrate specific facts showing that the communications were privileged.

[4] United States 393 12

393 United States
393I Government in General
393k7 Congress
393k12 k. Rights and Privileges of Senators and Representatives. Most Cited Cases

Legislative privilege clearly falls within the category of accepted evidentiary privileges, as the privilege is rooted in the absolute immunity granted to federal legislators by the Speech or Debate Clause and exists to safeguard that immunity. U.S.C.A. Const. Art. 1, § 6, cl. 1.

[5] Municipal Corporations 268 170

268 Municipal Corporations
268V Officers, Agents, and Employees
268V(A) Municipal Officers in General
268k170 k. Duties and Liabilities. Most Cited Cases

The legislative privilege covers all those properly acting in a legislative capacity, not just actual officeholders.

[6] States 360 28(2)

360 States
360II Government and Officers
360k24 Legislature
360k28 Members
360k28(2) k. Privileges and Exemptions. Most Cited Cases

Non-party independent contractor working as legal counsel and consultant for legislative redistricting efforts by partisan political party was not functional equivalent to legislative aide in Virginia's General Assembly, under Virginia law that did not authorize General Assembly members to employ consultants, contractors, or counsel or consultants for party caucuses, and authorized compensation of personnel deemed necessary for efficient operation of General Assembly through contingent fund of legislative house employing that staff member, and thus, consultant was not protected by legislative privilege from voters' requests for documents pertaining to redistricting that voters claimed violated equal protection by alleged racial gerrymandering. U.S.C.A. Const. Amend. 14; West's V.C.A. § 30–10.4.

[7] Municipal Corporations 268 170

268 Municipal Corporations
268V Officers, Agents, and Employees
268V(A) Municipal Officers in General
268k170 k. Duties and Liabilities. Most Cited Cases

The legislative privilege is one of non-evidentiary use of legislative acts against a legislator, not one of non-disclosure.

[8] States 360 28(2)

360 States
360II Government and Officers
360k24 Legislature
360k28 Members
360k28(2) k. Privileges and Exemptions. Most Cited Cases

Redistricting documents requested by voters claiming deprivation of equal protection based on alleged racial gerrymander of Virginia congressional district were discoverable from non-party independently contracted consultant for legislative redistricting efforts by partisan political party, since judicial inquiry into legislative motive was not prohibited for challenged legislative action that allegedly violated overriding, free-standing public policy such as that reflected in Equal Protection Clause and VRA. U.S.C.A. Const. Amend. 14; Voting Rights Act of 1965, § 2 et seq., 42 U.S.C.A. § 1973 et seq.

[9] States 360 28(2)

360 States
360II Government and Officers
360k24 Legislature
360k28 Members
360k28(2) k. Privileges and Exemptions. Most Cited Cases

Under any application of legislative privilege to non-legislator independently contracted as con-

sultant for redistricting efforts by partisan political party, balance of factors would favor allowing withholding of only communications containing legislators' actual deliberations from redistricting documents requested by voters claiming equal protection violation based on racial gerrymander of Virginia congressional district; documents regarding state's role in redistricting decisions was central to voters' claims, other evidence was only partially available, claims raised serious charges about fairness and impartiality of state government, and chilling effect from disclosure would not be as great as forced disclosure of deliberations between two legislators. U.S. Const. Amend. 15.

John Kuropatkin Roche, John Michael Devaney, Marc Erik Elias, Perkins Coie LLP, Washington, DC, Kevin Hamilton, Perkins Coie LLP, Seattle, WA, for Plaintiffs.

Trevor Stephen Cox, Hunton & Williams LLP, Mike Melis, Office of the Attorney General, Richmond, VA, for Defendants.

MEMORANDUM OPINION

ROBERT E. PAYNE, Senior District Judge.

***1** This matter is before the Court on the nonparty Christopher Marston's MOTION TO QUASH SUBPOENAS TO ROBERT B. BELL, WILLIAM ROBERT JANIS, AND CHRISTOPHER MARSTON AND/OR FOR A PROTECTIVE ORDER, Docket No. 61. For the reasons set forth below, the Motion will be denied in part.

BACKGROUND

Dawn Curry Page, Gloria Personhuballah, and James Farkas ("Plaintiffs") filed this action against Virginia State Board of Elections, Don Palmer, Kimberly Bowers, Charlie Judd, and Kenneth Cuccinelli II, ("Defendants") [FN1] alleging that the Plaintiffs' rights under the Equal Protection Clause of the United States Constitution were violated by the racial gerrymander of Virginia Congressional District 3 during the 2011–12 redistricting cycle. The Plaintiffs' request for hearing by a three-judge court pursuant to 28 U.S.C. § 2284(a) was granted by the Chief Judge of the United States Court of Appeals for the Fourth Circuit.

Kenneth Cuccinelli II (then the Attorney General of Virginia) and the Virginia State Board of Elections have been dismissed from this case by consent of the parties. Virginia's Republican Congressional delegation filed an unopposed motion to intervene as defendants. After the Court denied motions for summary judgment submitted by the Defendants and the Intervenor Defendants, Dawn Curry Page withdrew as a plaintiff upon consent of the parties.

The pending motion was originally filed by non-parties Robert B. Bell, William Robert Janis, and Christopher Marston, in response to a series of subpoenas issued by the Plaintiffs. Bell and Janis were members of the Virginia House of Delegates at the time of the redistricting. They were subpoenaed to give depositions, but Plaintiffs have since withdrawn the subpoenas, and Janis and Bell are no longer parties to this motion. From Marston, the Plaintiffs sought documents pertaining to the redistricting process. Marston has refused to produce those documents, claiming that the attorney-client privilege and the legislative privilege protect them from disclosure. The Court has completed an in camera review of the documents Marston claims to be protected by the attorney-client privilege and has upheld some claims of privilege while rejecting others. *See* Docket No. 90. Accordingly, this opinion will address only Marston's assertion of a legislative privilege.

In his declaration, Marston avers that, during the relevant time period, he "was Executive Director of and Counsel to the Virginia House Republican Caucus," but that he "was paid as an independent contractor by the House Republican Campaign Committee." The parties agree that the membership of the Caucus and the Campaign Committee is the same. However, at oral argument, counsel for Marston acknowledged that, notwithstanding the overlap in membership, the organizations are distinctly

different. The Caucus functions within the confines of the House of Delegates, whereas the Campaign Committee serves a political function, helping Republican delegates to be elected or re-elected.

***2** Marston also avers that, while he served as "legal counsel to the Speaker of the Virginia House of Delegates and the Virginia House Republican Caucus," he "also worked in a legislative capacity for the Republican members of the Virginia House of Delegates." His job in the latter capacity was coordinating communications and legislative strategy. Marston asserts that there were four staff members, but that, in his consulting capacity, he "effectively was lead staff for the redistricting efforts of the Virginia House of Delegates."

In his role of consultant, Marston "participated in crafting redistricting legislation; coordinating and gathering analysis of data and information from which redistricting legislation was introduced; assisted members of the House of Delegates in holding hearings on redistricting; assisted in preparing statements to members about redistricting; advised members and their staff regarding strategy for passage of redistricting legislation; and regularly engaged in frank discussions with members concerning the creation, evolution, and passage of redistricting legislation." Marston recites that, when performing those responsibilities, he "was a consultant due to the manner in which [he] was compensated."

DISCUSSION

[1][2][3] Testimonial and evidentiary privileges exist against the backdrop of the general principle that all reasonable and reliable measures should be employed to ascertain the truth of a disputed matter. Privileges are therefore strictly construed and accepted only where the public good associated with the exclusion of relevant evidence overrides the general principle in favor of admission. *Trammel v. United States*, 445 U.S. 40, 50, 100 S.Ct. 906, 63 L.Ed.2d 186 (1980). *See also Herbert v. Lando*, 441 U.S. 153, 175, 99 S.Ct. 1635, 60 L.Ed.2d 115 (1979) ("Evidentiary privileges in litigation are not favored"). "A party asserting privilege has the burden of demonstrating its applicability." *N.L.R.B. v. Interbake Foods, LLC*, 637 F.3d 492, 501 (4th Cir.2011). A conclusory assertion of privilege is insufficient to establish a privilege's applicability to a particular document; thus, the proponent of a privilege must "demonstrate specific facts showing that the communications were privileged." *RLI Ins. Co. v. Conseco, Inc.*, 477 F.Supp.2d 741, 751 (E.D.Va.2007).

[4][5] "Legislative privilege clearly falls within the category of accepted evidentiary privileges." *E.E.O.C. v. Wash. Suburban Sanitary Comm'n*, 631 F.3d 174, 180 (4th Cir.2011). The privilege is rooted in the absolute immunity granted to federal legislators by the Speech or Debate Clause of the United States Constitution and exists to safeguard that immunity. *Id.* at 180–181. In *Tenney v. Brandhove*, the Supreme Court of the United States found that the Speech or Debate Clause was part of a broader common law "tradition [of legislative privilege] ... well grounded in history" and extended the benefit of that tradition (though not the Speech or Debate Clause itself) to state legislators. 341 U.S. 367, 372–76, 71 S.Ct. 783, 95 L.Ed. 1019 (1951). *See also United States v. Johnson*, 383 U.S. at 169, 180 (1966). The privilege "covers all those properly acting in a legislative capacity, not just actual officeholders." *Wash. Suburban Sanitary Comm'n*, 631 F.3d at 181 (citing *Supreme Ct. of Va. v. Consumers Union of U.S., Inc.*, 446 U.S. 719, 731–34, 100 S.Ct. 1967, 64 L.Ed.2d 641 (1980)).

1. Eligibility for the Legislative Privilege

***3** The parties do not contest the existence of a legislative privilege. However, they sharply dispute whether Marston or the documents that were subpoenaed are protected by the privilege.

Marston relies on *McCray v. Md. Dep't of Transp., Md. Transit Admin.*, 741 F.3d 480, 484 (4th Cir.2014) and *Doe v. McMillan*, 412 U.S. 306, 312, 93 S.Ct. 2018, 36 L.Ed.2d 912 (1973), to support the proposition that, as an independently contracted legislative consultant, he is covered by the same privilege as elected legislators. But in both

cases, the extension of the legislative immunity or privilege was circumscribed by the specific nature of the consultant's duties. In *Doe v. McMillan*, an action was brought directly against, among others, legislators, legislative committee staff, a committee investigator, and a committee consultant. 412 U.S. at 309. The Supreme Court of the United States held that the suit against the parties was barred by the Speech or Debate Clause, but only insofar as it sought relief "for introducing materials at Committee hearings that identified particular individuals, for referring the Report that included the material to the Speaker of the House, and for voting for publication of the report." *Id.* at 312. In reaching that decision, the Court held that those activities were "an integral part of the deliberative and communicative processes by which Members participate in committee and House proceedings." *Id.* at 314 (quoting *Gravel v. United States*, 408 U.S. 606, 625, 92 S.Ct. 2614, 33 L.Ed.2d 583 (1972)). For that reason, the legislative immunity created by the Speech or Debate Clause foreclosed litigation over those activities. But the activities described in *McMillan* are quite unlike the consulting activities for which Marston claims the privilege. Nor does *McMillan* announce, or even suggest, the blanket extension of legislative privilege or immunity to legislative consultants that Marston urges.[FN2]

McCray is perhaps even less helpful to Marston's position. In *McCray*, the Fourth Circuit commented favorably on the concept of extending legislative privilege to government agency officials who gave counsel to executive officials tasked with carrying out legislative budget cuts. 741 F.3d at 484–85. But, the Court of Appeals also reversed the trial court's application of that privilege because the plaintiff's complaint alleged discriminatory actions by agency officials that predated any legislative action. *Id.* at 485–86. In light of that remand and the observation that, "McCray's lawsuit has not yet implicated legislative immunity," *id.* at 487, the Fourth Circuit's comments about the application of legislative privilege to non-legislators must necessarily be considered dicta. Moreover, those claiming the privilege were government agency officials, not a consultant who was employed by a partisan political committee.

In their opposition, the Plaintiffs argue that "non-legislators must be 'properly acting in a legislative capacity' before they can seek to assert legislative privilege." Opp. at 8 (quoting *Kensington Volunteer Fire Dep't, Inc. v. Montgomery Cnty., Md.*, 684 F.3d 462, 470 (4th Cir.2012)). The Plaintiffs have cited a pair of out-of-Circuit cases to bolster their argument that independent contractors should not have the benefit of legislative privilege. First, they rely on *Rodriguez v. Pataki*, 280 F.Supp.2d 89, *aff'd*, 293 F.Supp.2d 302 (S.D.N.Y.2003), wherein a magistrate judge ordered the production of documents from an advisory task force on redistricting. Notwithstanding that the advisory committee had been created by statute to provide technical assistance to the New York legislature and had been given all the powers of a legislative committee, the court ruled that the presence of non-legislators on the task force foreclosed use of the legislative privilege by any of the members of the task force.[FN3] 280 F.Supp.2d at 101–103. This decision appears to have been influenced by another district court decision, *Florida Ass'n of Rehab. Facs. v. State of Fla. Dep't of Health & Rehab. Servs.*, 164 F.R.D. 257 (N.D.Fla.1995), which favored legislative privilege for the personal staff of individual legislators but disfavored extension of the privilege to legislative employees who provided information to the collective legislature. *See* 164 F.R.D. at 267; *Rodriguez*, 280 F.Supp.2d at 101 (citing *Florida Ass'n* and providing a parenthetical explanation of its reasoning). The *Rodriguez* court concluded that "the legislatively—mandated structure of [the advisory committee] makes its working more akin to a conversation between legislators and knowledgeable outsiders, such as lobbyists, to mark up legislation—a session for which no one could seriously claim privilege." 280 F.Supp.2d at 101.

***4** In the other cited case, *Comm. for a Fair & Balanced Map v. Ill. State Bd. of Elecs.*, Case No.

11C5065, 2011 WL 4837508 (N.D.Ill. Oct.12, 2011) the court held that legislative privilege did not apply to "[c]ommunications between [state legislators] and outsiders to the legislative process ... includ [ing] lobbyists, members of Congress and the Democratic Congressional Campaign Committee." *Id.* at *10. The same holding was applied to "experts and/or consultants retained or utilized by [legislators] to assist in the redistricting process." *Id.* The Court expressed a concern that "[a] contrary ruling would allow a legislator to cloak any communication with legislative privilege by simply retaining an outsider in some capacity." *Id.* (quoting *ACORN v. County of Nassau*, Case No. 05–2301, 2007 WL 2815810, at *6 (E.D.N.Y. Sept.25, 2007) (describing discussions between legislators and consultants before the consultants issued a report as "more like conversations between legislators and knowledgeable outsiders" and holding that such discussions are discoverable)).

[6] In sum, none of the decisions cited by the parties addresses a circumstance such as that presented here by Marston's affidavit which sets out the details about his relationship with the Virginia General Assembly. Docket No. 84, Exh. A. There, Marston says that he was employed full-time as the "Executive Director of and Counsel to the Virginia House Republican Caucus" during the period relevant to this litigation. *Id.* at ¶ 3. He describes himself as "work[ing] in a legislative capacity for the Republican members of the Virginia House of Delegates, coordinating communications and legislative strategy." *Id.* at ¶ 5. However, Marston acknowledges that he "was paid as an independent contractor by the House Republican Campaign Committee." Nonetheless, he seeks the benefit of the legislative privilege because, in his words, "I effectively was lead staff for the redistricting efforts of the Virginia House of Delegates." *Id.* at ¶¶ 9–12. Marston's position is that these facts make his status equivalent to a legislative aide in Virginia's General Assembly.

However, as the Plaintiffs have pointed out, the Virginia Code specifically identifies the personnel that can be employed by individual legislators and standing legislative committees in the General Assembly, and the Code also specifies the procedures for appropriating the funds to compensate those staff members. *See* Va.Code Ann. § 30–10.4. The Code does not authorize individual General Assembly members to employ consultants, contractors, or counsel or consultants for the party caucuses, an omission that the Court must regard as significant under the legislative interpretative rule of *expressio unius*. *Cf. Commonwealth v. Brown*, 259 Va. 697, 704–05, 529 S.E.2d 96, 100 (2000). And, while the statute might conceivably permit a consultant to be retained by a standing legislative committee as "other staff personnel," Marston has neither claimed nor demonstrated that he was retained by such a committee.

***5** Even more telling is Va.Code Ann. § 30–19.20, which reads:

> The House of Delegates and the Senate and the clerks thereof are authorized to employ such personnel as may be deemed necessary for the efficient operation of the General Assembly as prescribed by the rules or resolutions of the respective houses. The House of Delegates and the Senate shall by resolution or resolutions set the compensation of the personnel employed by each house, and the personnel shall be paid from the contingent fund of each house, respectively.

This statutory provision invites the House of Delegates and Senate to identify any personnel "deemed necessary for the efficient operation of the General Assembly," and then allows compensation of those personnel through legislative action and the contingent fund of the legislative house that employs the particular staff member. As a matter of simple logic, then, a decision not to pay an individual from the contingent fund of either house is tantamount to an acknowledgement that the individual in question is not "necessary to the efficient operation of the General Assembly" and therefore not a staff member of the General Assembly.

Precedent demands that, under certain circumstances, formal staff members should be treated as the functional equivalent of legislators for the purpose of legislative immunity and legislative privilege. That is because "[t]he day-to-day work of such aides is so critical to the Members' performance that they must be treated as the latter's alter egos." *Gravel v. United States,* 408 U.S. 606, 616–617, 92 S.Ct. 2614, 33 L.Ed.2d 583 (1972). Even then, there is some reason to question whether committee or general legislative staff members should receive the same deference as staff members who work exclusively for a particular legislator. *See Florida Ass'n of Rehab. Facs. v. State of Fla. Dep't of Health & Rehab. Servs.,* 164 F.R.D. 257, 267 (N.D.Fla.1995).

Marston asks the Court to automatically treat the functional equivalent of an Assembly—wide staff member as the functional equivalent of an individual legislator, and that is a bridge too far. When state statute specifically provides a structure for the retention of aides and assistants by individual legislators and standing committees, and even provides a mechanism for the retention of at—large legislative assistants where "necessary to the efficient operation of the General Assembly," a legislative consultant and independent contractor paid by a political group, the House Republican Campaign Committee, has no grounds to claim that he is so critical to the performance of the legislature that he should be treated as a legislative alter ego and extended the benefit of legislative privilege.[FN4] To hold otherwise would be to ignore the structural limits imposed by Virginia law. Those limits serve to identify those whose work is sufficiently important to the functioning of the General Assembly that they are "an integral part of the deliberative and communicative process" by which legislators participate in legislative proceedings. *Gravel v. United States,* 406 U.S. at 625. And, it is those people who are encompassed by the legislative privilege.

***6** Moreover, a requirement that a legislative assistant or aide be directly employed and paid by an individual legislator, a legislative committee, or the legislature as a whole provides a sensible and defensible bulwark against excessive use of the legislative privilege. It prevents legislators from enveloping lobbyists and outside experts in a cloak of invisibility, while permitting state legislatures the freedom to make their own decisions about what staff members are sufficiently important to be formally retained by the state government and thus be eligible for the privilege. And, indeed, that is a salutary result of applying the Virginia statutes to determine Marston's status.

For the foregoing reasons, the Court finds that Marston is not eligible to receive the benefit of legislative privilege.

2. Balancing of the Legislative Interests

[7] Even if it is assumed that Marston is entitled to legislative privilege, it would be necessary to determine whether the privilege forecloses the document discovery sought by the Plaintiffs' subpoenas. As the Fourth Circuit has held, the legislative privilege "falls within the category of accepted evidentiary privileges," *E.E.O.C. v. Wash. Suburban Sanitary Comm'n,* 631 F.3d 174, 180 (4th Cir.2011). And, the "legislative privilege is one of non-evidentiary use of legislative acts against a legislator, not one of non-disclosure." *E.E.O.C. v. Wash. Suburban Sanitary Comm'n,* 666 F.Supp.2d 526, 532 (D.Md.2009), *aff'd* 631 F.3d 174 (4th Cir.2011) (citing *In re Grand Jury,* 821 F.2d 946, 958 (3d Cir.1987)). Thus, here as in *Wash. Suburban Sanitary Comm'n,* the argument that legislative privilege is an impenetrable shield that completely insulates any disclosure of documents" is not tenable. *Id.*

The teaching of *Marylanders for Fair Representation, Inc. v. Schaefer,* 144 F.R.D. 292 (D.Md.1992), wherein a three judge court was confronted with a challenge to legislative redistricting, is instructive here:

> Legislative redistricting is a *sui generis* process. While it is an exercise of legislative power, it is

> not a routine exercise of that power. The enactment of statutes ordinarily involves the implication of public policy by a duly constituted legislative body. Redistricting involves the establishment of the electoral structure by which the legislative body becomes duly constituted. Inevitably, it directly involves the self-interest of the legislators themselves.

Id. at 304 (Murnaghan & Motz, JJ., concurring). That significant difference prompted the court to require a flexible approach to resolving discovery objections based on legislative privilege.

[8] In assessing the applicability of the legislative privilege, it is necessary to remember that the privilege is an outgrowth of the doctrine of legislative immunity because the privilege was thought necessary to effectuate the immunity. *E.E.O.C. v. Wash. Suburban Sanitary Comm'n*, 631 F.3d at 181. That immunity, held the court in *Marylanders for Fair Representation*, "does not however, necessarily prohibit judicial inquiry into legislative motive where the challenged legislative action is alleged to have violated an overriding, free-standing public policy." *Marylanders for Fair Representation v. Schaefer*, 144 F.R.D. at 304 (Murnaghan & Motz, JJ ., concurring) (citing *Village of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 268, 97 S.Ct. 555, 50 L.Ed.2d 450 (1977)). With that precept in mind, the court permitted discovery of the non-legislators on the Governor's Redistricting Advisory Committee.[FN5] Here, there is an overriding, free-standing public policy reflected in the Equal Protection Clause of the federal Constitution and the Voting Rights Act. Both parties have placed squarely into issue the legislative motive in enacting the redistricting legislation. Applying the principles announced in *Marylanders for Fair Representation*, it is, therefore, appropriate to permit the discovery of documents from a non-legislator that are demanded in the subpoena.

***7** Other courts have used a more fact-intensive set of factors to balance the interests in deciding whether the legislative privilege applies to a given redistricting case. The analysis is somewhat less flexible than the one heralded by *Marylanders for Fair Representation*, but the essential factors as applied in this case provide added justification for disclosure of the documents sought by the Plaintiffs' subpoena.

[9] For example, in determining whether a qualified privilege should be applied when discovery of legislative documents was at issue, the court, in *Rodriguez v. Pataki*, 280 F.Supp.2d 89 (S.D.N.Y.2003), another case involving a Congressional redistricting plan, used a five-factor analysis incorporating: "(i) the relevance of the evidence sought to be protected; (ii) the availability of other evidence; (iii) the 'seriousness' of the litigation and the issues involved; (iv) the role of government in the litigation; and (v) the possibility of future timidity by government employees." *Id.* at 100–01. Other redistricting decisions have followed suit. *See Comm. for a Fair & Balanced Map v. Ill. State Bd. of Elecs.*, Case No. 11C5065, 2011 WL 4837508, at *7–*10 (N.D.Ill. Oct.12, 2011) (applying same five factors); *Favors v. Cuomo*, 285 F.R.D. 187, 217–21 (E.D.N.Y.2012) (same). Application of those factors to the facts of this case produces results similar to those that come from using the approach to legislative privilege called for by *Marylanders for Fair Representation.*

A. The Relevance of the Evidence and the Role of the Government in the Litigation

The state government's role in the events giving rise to the present litigation is central to the Plaintiffs' claims. The Plaintiffs seek strict scrutiny review of facially neutral redistricting legislation, a standard only triggered "if it can be proved that the law was motivated by a racial purpose or object or if it is unexplainable on grounds other than race." *Hunt v. Cromartie*, 526 U.S. 541, 546, 119 S.Ct. 1545, 143 L.Ed.2d 731 (1999) (internal citations and quotations omitted). The subjective decision-making process of the legislature is at the core of the Plaintiffs' claims, *cf.* Favors, 285 F.R.D. at 219–20; *Fair and Balanced Map*, 2011 WL

4837508, at *8. And, once strict scrutiny has been triggered, "the government has the burden of proving that racial [criteria] 'are narrowly tailored measures that further compelling government interests.' " *Johnson v. California*, 543 U.S. 499, 505, 125 S.Ct. 1141, 160 L.Ed.2d 949 (2005) (quoting *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227, 115 S.Ct. 2097, 132 L.Ed.2d 158 (1995)). The question of narrow tailoring must also inevitably involve an inquiry into the subjective motivations of the legislature.

Obviously, any documents containing the opinions and subjective beliefs of legislators or their key advisors would be relevant to the broader inquiry into legislative intent and the possibility of racially motivated decisions that were not adequately tailored to a compelling government interest. But even purely factual material can shed light on what factors and considerations were foremost in the legislature's mind while the legislation was pending. Given the centrality of the legislature's motivations and Marston's inability to offer more than a conclusory assertion that "the vast majority" of the documents in dispute "are not, in fact, highly relevant to Plaintiffs' claims," [FN6] the Court finds that the Relevance factor and the Role of Government factor weigh in favor of disclosure.

B. Availability of Other Evidence

***8** Marston argues that, "in order to establish their case, Plaintiffs 'need not offer direct evidence of discriminatory intent.' " Reply at 6 (quoting *Comm. for a Fair and Balanced Map v. Ill. State Bd. of Elecs.*, No. 11C5065, 2011 WL 4837508, at *3 (N.D.Ill. Oct.12, 2011)). He correctly points out that plaintiffs are generally entitled to rely on circumstantial factors such as district shape, racial bloc voting, low minority registration, and minority retrogression when litigating redistricting decisions. See *id.* But, when defendants do not base their entire defense on the absence of race-based motivations, the value of circumstantial evidence is decreased. The Intervenor–Defendants in this action have argued that any race-based redistricting decisions were narrowly tailored to the compelling government interest of compliance with Section 5 of the Voting Rights Act. *See* Docket No. 44 (Int. Def's Opp. to Motion for Summary Judgment). The circumstantial factors iterated by Marston provide little insight into what the legislature deemed necessary for "compliance" or whether less race-based alternatives were given serious consideration.

Admittedly, the Plaintiffs can obtain and introduce some direct evidence even without the benefit of Marston's documents. For example, they have already signaled their intent to include direct evidence about the views of Delegate Janis, the chief architect of the enacted 2012 redistricting plan. *See* Plaintiffs' Trial Brief, Docket No. 86, at 3–5. And, they may rely on the previously identified circumstantial evidence. However, the availability of statements made by Janis and that circumstantial evidence does not mean that the Plaintiffs must confine their proof to those statements or to the circumstantial evidence. The real proof is what was in the contemporaneous record in the redistricting process. Taken as a whole, the Court finds that this factor does not militate against disclosure of the documents in Marston's possession.

C. Seriousness of the Claims

The right to vote and the rights conferred by the Equal Protection Clause are of cardinal importance. And, there is no dispute over the seriousness of the Plaintiffs' claims.

As in *Fair and Balanced Map*, "Plaintiffs raise profound questions about the redistricting process and the viability of the [map produced by that process.]" *Fair and Balanced Map*, 2011 WL 4837508, at *6. "Additionally, although this [redistricting] suit is not brought on behalf of the United States, there can be no question that it raises serious charges about the fairness and impartiality of some of the central institutions of our state government." *Rodriguez v. Pataki*, 280 F.Supp. 89, 102 (S.D.N.Y.2003). The Court finds that the nature of the claims in this action weigh strongly in favor of document disclosure.

D. Potential for a Chilling Effect

Finally, it is necessary to consider the potential for "future timidity" within the halls of the legislature that may "inhibit frank and full deliberations" in legislative activity. *See Favors,* 285 F.R.D. 187, 220. To be sure, the disclosure of communications between an independent contractor who is consulting with a legislative group and the members of that group does not have as a great of a chilling effect as the forced disclosure of deliberations between two legislators. But, any effort to disclose the communications of legislative aides and assistants who are otherwise eligible to claim the legislative privilege on behalf of their employers threatens to impede future deliberations by the legislature. Other courts have taken this threat quite seriously, and have sought to mitigate it. Accordingly, *Rodriguez v. Pataki,* 280 F.Supp.2d 89 (S.D.N.Y.2003), while rejecting the general assertion of legislative privilege, prevented disclosure of "information concerning the actual deliberations of the Legislature ." *Id.* at 102–03. And the majority of the panel in *Marylanders for Fair Representation, Inc. v. Schaefer,* 144 F.R.D. 292 (D.Md.1992) permitted the deposition of non-legislators, but only as to actions taken before the redistricting legislation reached the floor of the legislature. *Id.* at 304–05 (Murnaghan & Motz, JJ., concurring). With an eye towards accounting for the three factors that favor disclosure in this matter, while acknowledging the threat of a legislative chill and the partial availability of other evidence, this Court finds that, even if Marston were eligible to claim the legislative privilege, he would be entitled to withhold only those documents concerning the actual deliberations of the Legislature once the redistricting legislation had been formally introduced.

3. Scope of the Document Production Request

***9** Although Marston has not presented any specific objections to the scope of the document production request appended to the subpoena, it is nonetheless appropriate to examine the scope of the production request closely in order to monitor the discovery process and manage the litigation. Having done so, the Court finds that paragraph 1 is overly broad. The request is thus modified to call for "all maps and draft maps in your possession that were considered in the 2012 Virginia redistricting process, and all communications in your possession about those maps." The request in paragraph 2 is also too broad and is hereby modified to call for "all communications between members of the General Assembly, the staff of the General Assembly, and you [the recipient of the subpoena] that mention the 2012 Virginia redistricting process." The request in paragraph 7 is so broad as to be untenable, and is stricken in its entirety. The requests in paragraphs 3, 4, 5, and 6 are reasonable, are reasonably calculated to lead to the discovery of relevant evidence, and are clearly focused upon the claims and defenses of the parties as presented in their various papers filed with the Court.

CONCLUSION

For the reasons set forth above, the non-party Christopher Marston's MOTION TO QUASH SUBPOENAS TO ROBERT B. BELL, WILLIAM ROBERT JANIS, AND CHRISTOPHER MARSTON AND/OR FOR A PROTECTIVE ORDER, Docket No. 61, is DENIED IN PART with respect to the assertion of a legislative privilege. Marston shall turn over all documents that are responsive to the demands of subpoena (as modified by the Court) except for those previously identified by the Court as being covered by the attorney-client privilege.

It is so ORDERED.

FN1. Palmer, Bowers, and Judd were sued in their official capacities as members of the Virginia State Board of Elections. Cuccinelli was sued in his official capacity as the Attorney General of Virginia.

FN2. Indeed, *McMillan* appears to involve a consultant who was directly retained and compensated by a legislative committee. This would make him much more like a legislative aide than a consultant who re-

ceives payment from a partisan political group.

FN3. This decision speaks to both the scope of the privilege and the issue of waiver; the non-legislators were not within the scope of the privilege, and therefore the legislators had effectively waived the privilege by disclosing the documents to third parties outside the scope of the privilege.

FN4. It is not necessary to reach the question whether Marston would have been covered by the legislative privilege if he had been formally retained by the General Assembly or one of its committees (as opposed to retention by an individual legislator capable of asserting the privilege). For the purposes of this case, it is enough to say that the informal nature of Marston's retention prevents him from receiving the privilege.

FN5. The court actually permitted depositions to be taken. It is not necessary to reach that issue in this case because no deposition of Marston is sought. The only thing required is document disclosure.

FN6. *See* Reply at 6, Docket No. 84.

E.D.Va.,2014.
Page v. Virginia State Bd. of Elections
--- F.Supp.2d ----, 2014 WL 1873267 (E.D.Va.)

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Only the Westlaw citation is currently available.

This decision was reviewed by West editorial staff and not assigned editorial enhancements.

United States District Court, N.D. California, San Jose Division.
RYAN INVESTMENT CORPORATION, Plaintiff,
v.
PEDREGAL DE CABO SAN LUCAS; CAPELLA PEDREGAL-CABO SAN LUCAS, formerly known as Farallon Spa & Resort; Juan Diaz Rivera, an individual; Desarrolladora Farallon, Sociedad De Responsabilidad Limitada De Capital Variable, commonly known as Desarrolladora Farallon S. De R.L.; and Does 1 through 20, inclusive, Defendants.
Desarrolladora Farallon, Sociedad De Responsabilidad Limitada De Capital Variable, Counter-Claimant,
v.
Ryan Investment Corporation, a California Corporation; and Brent R. Waldman, an individual, Counter-Defendants.

No. C 06-3219 JW (RS).
Dec. 18, 2009.

Mark Aloysius O'Connor, Horan, Lloyd Law Offices, Monterey, CA, for Plaintiff/Counter-Defendants.

George John Berger, Allen Matkins Leck Gamble Mallory & Natsis LLP, San Diego, CA, for Plaintiff/Defendants/Counter-Defendants.

ORDER GRANTING IN PART AND DENYING IN PART PLAINTIFF'S MOTION TO COMPEL

RICHARD SEEBORG, United States Magistrate Judge.

INTRODUCTION

***1** This discovery dispute has arisen post-judgment and is governed by Federal Rule of Civil Procedure 69(a)(2), which regulates discovery in aid of judgment or execution. As set forth below, plaintiff's motion to compel is granted in part and denied in part.

FACTUAL AND PROCEDURAL HISTORY

In March 2009, the presiding judge in this real estate contract dispute entered judgment in favor of plaintiff Ryan Investment Corporation and against defendants Pedregal de Cabo San Lucas, Leticia Diaz Rivera, and Manuel Diaz Rivera, jointly and severally, in the amount of $1,500,000.00. Defendants' appeal is currently pending before the Ninth Circuit. Meanwhile plaintiff has begun discovery proceedings to aid in execution of its judgment, propounding numerous interrogatories and requests for production ("RFPs") on defendants. Apparently defendants' assets in the United States are limited to a few dormant bank accounts. As to their assets in Mexico, defendants have informed plaintiff that they "will not at this time provide any specifics." Furthermore, they object to many of plaintiff's discovery requests on the grounds of overbreadth, privilege, harassment, and "third party confidentiality." Plaintiff has therefore brought this motion to compel defendants to respond to both its interrogatories and its RFPs.

LEGAL STANDARD

Federal Rule of Civil Procedure 69 provides, in pertinent part: "In aid of the judgment or execution, the judgment creditor ... may obtain discovery from any person-including the judgment debtor-as provided in these rules or by the procedure of the state where the court is located." Fed.R.Civ.P. 69(a)(2). "The discovery contemplated by Rule 69(a) is a distinct phase of the litigation with a narrow focus. It is solely to enforce the judgment by way of the supplemental proceedings." *Danning v. Lavine*, 572 F.2d 1386, 1390 (9th Cir.1978). One purpose of such special discovery is "to identify assets that can be used to satisfy a judgment." *1ST Tech., LLC v. Rational Enters. Ltd.*, 2007 WL 5596692, at *4 (D.Nev. Nov.13, 2007). Another

purpose is "to discover concealed or fraudulently transferred assets." *Fid. Nat'l Fin., Inc. v. Friedman*, 2007 WL 446134, at *2 (D.Ariz. Feb.7, 2007) ; *see also British Int'l Ins. Co., Ltd. v. Seguros La Republica, S.A.*, 200 F.R.D. 586, 589 (W.D.Tex.2000) ("*British International II*") (noting that post-judgment discovery can be used to gain information relating to the "existence or transfer of the judgment debtor's assets").

Generally, the scope of post-judgment discovery is broad. " '[T]he judgment creditor must be given the freedom to make a broad inquiry to discover hidden or concealed assets of the judgment debtor.' " *1ST Technology*, 2007 WL 5596692 at *4 (quoting *British International II*, 200 F.R.D. at 588). Further, due to its broad scope, a party is free to use any means of discovery allowable under the Federal Rules of Civil Procedure. *Sec. and Exch. Comm'n v. Tome*, 1987 WL 9415, at * 1 (S.D.N.Y. Apr.3, 1987); *see also* Fed.R.Civ.P. 69 advisory committee's note to 1970 Amendment ("The amendment assures that, in aid of execution on a judgment, all discovery procedures provided in the rules are available[.]"). "A judgment creditor is therefore ordinarily entitled to a very thorough examination of a judgment debtor with respect to its assets, including discovery [of] the identity and location of any of the judgment debtor's assets, wherever located." *British Int'l Ins. Co. v. Seguros La Republica, S.A.*, 2000 WL 713057, at *5 (S.D.N.Y. June 2, 2000) ("*British International I*") (internal citations omitted).

ANALYSIS

A. *Effect of Foreign Law on Rule 69 Discovery Proceedings*

***2** Defendants' principal objection is that Mexican law bars the execution of the March 2009 judgment on defendants' Mexican property until the entire case, including the appeal, is complete.[FN1] Defendants reason that, if their property cannot yet be subject to execution, it is premature to supply plaintiff with information about such property.

FN1. The papers pertaining to this motion do not contain a request for judicial notice of relevant Mexican law to this effect. Nonetheless, it appears undisputed that Mexican law bars execution of judgments while an appeal is pending, and the Court will so assume for purposes of this motion.

The Ninth Circuit has not directly addressed this issue, nor has it arisen in many other judicial decisions. In *British International I*, an opinion from the Southern District of New York, the execution of an American judgment on property located in Mexico was at issue. 2000 WL 713057, at *6. Contrary to the present action, in that case there was no pending appeal. Rather, all that remained was a parallel Mexican proceeding which sought to challenge the result in the American case. *Id.* at *1. In ruling that Rule 69 discovery could proceed despite the Mexican action, the court noted: "Indeed, if this action did not involve a second lawsuit in a foreign country, [the losing party] would be able to reverse this Court's judgment only by successfully prosecuting an appeal. Absent the entry of a stay, however, [the prevailing party] would be entitled to conduct asset discovery during the pendency of that appeal." *Id.* at *6. The court then cited settled authority indicating that discovery in aid of execution is not precluded by the filing of an appeal. *Id.; see also Brae Asset Funding, L.P. v. Applied Financial, LLC*, 2006 WL 3497876, at *3 (N.D.Cal. Dec.4, 2006) (holding that " 'discovery in aid of its execution is not precluded by the filing of an appeal' " (quoting *Nat'l Serv. Indus., Inc. v. Vafla Corp.*, 694 F.2d 246 (11th Cir.1982)).

The decision in *British International I* is consistent with the built-in choice of law language in Rule 69(a)(2) itself, which provides that discovery may proceed "as provided in these rules or by the procedure of the state where the court is located"-thereby suggesting that the discovery procedures in the Federal Rules can trump equivalent procedures in the jurisdiction where the assets are located.[FN2] For these reasons, defendants' objections based on Mexican law must fall.

FN2. This is not to say that Mexican law bars discovery in aid of execution while an appeal is still pending. Tellingly, defendants have only asserted that Mexican law bars execution of a judgment, not discovery in aid of such execution.

B. *Overbreadth*

Defendants also contend that many of plaintiff's discovery requests suffer from overbreadth, first because they request information reaching as far back as 2006; and second because they request information concerning all transfers in amounts over $500-an amount which defendants contend is too low.[FN3]

FN3. The only discovery requests that actually contain a lower limit of $500 are RFPs 3 and 7, and thus these are the only discovery requests to which this subdispute pertains.

As to the former concern, the complaint indicates that the parties first began business dealings in 2002, and plaintiff commenced this case in April 2006. The time period from 2006 to the present is a reasonable time period for the scope of Rule 69 discovery. This type of discovery is designed specifically to aid in the enforcement of the court's judgment, and, as noted above, its scope is necessarily very broad. *1ST Technology*, 2007 WL 5596692 at *4.

***3** As to the amount which triggers the disclosure obligation, "[a]ny non-*de minimis* transfers of assets after [the date at which the disclosing party knows the extent of its liability] could be construed as an attempt by [that party] to avoid his financial obligation ... by liquidating any personal holdings that might be levied upon in the event of default." *Dering v. Pitassi*, 1988 WL 115806, at *2 (E.D.Pa. October 26, 1988). While defendants complain that plaintiff's $500 "floor" is too low and will cause unnecessary and irrelevant disclosure, they make no specific showing in support of that claim. Rather, by all appearances, defendants will have to examine the same body of information and records to respond to plaintiff's discovery requests, whether the "floor" is $500, $5,000, or any other amount. It is possible to imagine circumstances in which transactions in the $500 range might be considered "*de minimis*," but in this case defendants have shared no information about the kind of transactions in which they typically engage. Accordingly, plaintiff's motion to compel will be granted insofar as it requests information on defendants' financial transactions dating back to 2006 and disclosure of all transactions over $500.

C. *Privilege*

Defendants next contend that three of plaintiff's requests for production (7, 8, and 15) seek materials that are privileged under the attorney-client privilege and the work product doctrine. Defendants have not, however, produced a log detailing any materials being withheld on such privilege grounds.

As noted at the hearing, counsel's communications with the client and work product developed once the litigation commences are presumptively privileged and need not be included on any privilege log. As to other materials, however, such as publicly available documents filed with the Mexican courts, no privilege would attach. Plaintiff's motion to compel is therefore denied to the extent it seeks to require a log of post-litigation counsel communications and work product, but is granted to the extent that any other materials withheld on privilege grounds must be accounted for on a privilege log. *See In re Grand Jury Investigation*, 974 F.2d 1068 (9th Cir.1992).[FN4] Should plaintiff later wish to press for disclosure of the logged items, it may bring a motion to compel at that time.

FN4. "[P]rivilege logs must be sufficiently detailed to allow informed evaluation of the objecting party's claims. To that end, this Court will require that privilege logs separately identify each document withheld under claim of privilege, and set forth for each document (1) its type (i.e., letter, memo, notes, etc.), (2) its author, (3) its in-

> tended recipients, (4) the names of any other individuals with access to the document, (5) the date of the document, (6) the nature of the claimed privilege (i.e., attorney-client, work-product, etc.), and (7) a brief summary of the subject matter of the document." *In re Grand Jury Investigation,* 974 F.2d at 1070.

D. *Third Party Confidentiality*

Defendants also object to responding to several of plaintiff's discovery requests on the grounds that they seek private and confidential information about third parties.[FN5] Third persons can only be examined about assets of the judgment debtor and cannot be required to disclose their own assets. *Caisson Corp. v. County W. Bldg. Corp.,* 62 F.R.D. 331, 334 (D.Pa.1974). Nonetheless, discovery may be permitted where the relationship between judgment debtor and nonparty is sufficient to raise a reasonable doubt about the "bona fides of the transfer of assets." *Strick Corp. v. Thai Teak Prods. Co.,* 493 F.Supp. 1210, 1218 (D.Pa.1980). Here, defendants have failed to explain exactly why plaintiff's discovery requests would require third parties to disclose their own private information. Insofar as information exists about *defendants'* assets, however, plaintiff is entitled to that information. Defendants are instructed to respond to plaintiff's discovery requests with these considerations in mind.

> FN5. Specifically, defendants raise this objection as to RFPs 1, 3-5, 7, 16, 17, and 20-27; and Interrogatories 9-13, 15, 19, and 32-34.

E. *Harassment*

***4** As several federal courts have noted, Rule 69 discovery can indeed resemble the proverbial fishing expedition, "but a judgment creditor is *entitled* to fish for assets of the judgment debtor." *Banco Cent. de Para. v. Para. Humanitarian Found.,* 2006 WL 3456521, at *9 (quoting *Capital Co. v. Fox,* 15 F.Supp. 677, 678 (S.D.N.Y.1936)) (emphasis added). Of course, discovery requests propounded solely to harass must be forbidden. *Caisson,* 62 F.R.D. at 334. None of the requests listed by defendants warrants such a characterization.[FN6] Without more specific information as to why defendants believe such requests exist only for this purpose, their objections must be overruled.

> FN6. This list includes RFPs 1, 3, 4, 7, 8, and 20-27; and Interrogatory 19.

F. *Response Already Complete*

Finally, defendants claim that they have responded completely to RFPs 8, 15, 18, and 19. It is not entirely clear whether plaintiff disputes this claim. To the extent that any material responsive to these requests remains to be produced, defendants will be required to complete that production within 20 days of the date of this order.

CONCLUSION

Plaintiff's motion to compel is granted in part and denied in part as set forth above.

IT IS SO ORDERED.

N.D.Cal.,2009.
Ryan Inv. Corp. v. Pedregal de Cabo San Lucas
Not Reported in F.Supp.2d, 2009 WL 5114077 (N.D.Cal.)

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Only the Westlaw citation is currently available.

This decision was reviewed by West editorial staff and not assigned editorial enhancements.

United States District Court,
E.D. New York.
UNITED STATES, Plaintiff,
v.
BOUCHARD TRANSPORTATION, et al., Defendants.

No. 08–CV–4490 (NGG)(ALC).
April 14, 2010.

Tiana A. Demas, United States Attorneys Office, Brooklyn, NY, for Plaintiff.

Ronald W. Zdrojeski, Edward J. Heath, Nuala Droney, Peter R. Knight, Robinson & Cole, LLP, Hartford, CT, for Defendants.

ORDER

CARTER, United States Magistrate Judge.

***1** On February 22, 2010, Plaintiff filed a motion to compel Defendants to produce a privilege log for all documents and communications created on or before January 1, 2008, which were withheld on the basis of privilege. According to Plaintiff, Federal Rule of Civil Procedure 26(b)(5) and Local Civil Rule 26(a)(2) (A), which both require a party to disclose specific information with regard to documents withheld on the basis of privilege, "are not starting points for a discussion concerning the handling of privileged documents nor are they merely suggested practice guidelines that attorneys are free to disregard. They are *rules*, and in the absence of a court [o]rder or stipulation providing otherwise, they must be obeyed." Pl.'s Mot. at 3 (citing *FG Hemisphere Assocs. v. Republique du Congo*, No. 01–CV–8700, 2005 WL 545218, at *5 (S.D.N.Y. Mar.8, 2005)).

Moreover, Plaintiff argues that it is substantially prejudiced as a result of Defendants' failure to produce a privilege log. According to Plaintiff, Defendants are in possession of multiple documents which are not covered by the work product privilege or which are nevertheless discoverable despite a properly asserted privilege. Plaintiff gives several examples of factual materials it believes Defendants are refusing to produce on the basis of privilege but to which Plaintiff feels it is entitled based on its substantial need and inability, without undue hardship, to obtain the substantial equivalent through other means. *See* Fed.R.Civ.P. 26(b)(3)(A)(ii). It is Plaintiff's position that, without a privilege log, it has no means of contesting Defendants' failure to produce records that are in fact discoverable.

Defendants oppose Plaintiff's motion, arguing that requiring Defendants to produce a privilege log would be "pointless and wasteful." Defs.' Resp. at 2. Defendants' argument rests on the contention that, because several government investigations were initiated immediately after the February 21, 2003 explosion of a Bouchard barge on the Arthur Kill Waterway, all documents created from that point forward were necessarily created "in anticipation of litigation." Defendants list three inquiries, warrants, and/or subpoenas that were served or propounded on Defendants in the few months immediately following the incident. Citing *Capital Records, Inc. v. MP3tunes, LLC*, 261 F.R.D. 44, 51 (S.D.N.Y. Aug.13, 2009), Defendants argue that the shift in their focus from investigating the cause and potential consequences of the incident to defending possible lawsuits "occurred when Bouchard's attorneys arrived on the scene of the explosion and defended against the onslaught of Government inquiries and potential civil claims flowing from the explosion." Defs.' Resp. at 3.

I have read the parties' submissions and find that, pursuant to Fed.R.Civ.P. 26(b)(5) and Local Civil Rule 26(a)(2)(A), Defendants are required to

submit a privilege log for documents created before January 1, 2008. I appreciate Defendants' argument that, in light of various government investigations that took place in the several months immediately after the incident, all documents created from that point forward were created in anticipation of litigation. Ultimately, however, I find Defendants' argument unpersuasive for several reasons.

***2** First, privilege logs are commonly limited to documents created before the date litigation was initiated. This is due to the fact that, in many situations, it can be assumed that all documents created after charges have been brought or a lawsuit has been filed and withheld on the grounds of privilege were created "because of" that pending litigation. It may be the case here that Defendants are in fact able to claim privilege with regard to every document created between the time of the incident and the inception of litigation as having been created in anticipation of litigation. But unlike cases in which litigation has commenced, the facts here are not sufficient for the Court to automatically assume so. *Capital Records* is not to the contrary. Although the Honorable Magistrate Judge Maas in that case recognized that the defendant's transition to creating documents solely because of litigation arguably occurred before the commencement of the litigation pending before him, he nevertheless tied the cutoff date of the defendant's privilege log to the date a prior, overlapping litigation was filed. *See Capital Records, Inc.*, 261 F.R.D. at 51. Here, no similar bright-line date marking the commencement of litigation, as opposed to investigation, exists to support Defendants' position.[FN1]

> FN1. Although I find that Plaintiff is legally required to produce a privilege log for all documents created before the date this lawsuit was filed, the Plaintiff has agreed to further limit the time period to January 1, 2008, the date when Plaintiff began communication with Defendants about bringing this action.

In addition, as a practical matter, it is not clear that a party in Defendants' position would have remained "in anticipation of litigation" for the entire five year period at issue. Defendants point to government investigations that were initiated in the initial months after the incident. According to Defendants, at some point after responding to those government inquiries, Defendants' responsive documents were packed up and placed in storage. Defs.' Resp. at 2. Therefore, it is conceivable that at some point in the intervening five years, when no complaints or lawsuits were forthcoming, Defendants' anticipation of litigation diminished.

Finally, Defendants' argument that, rather than requiring Defendants to produce a lengthy privilege log, "the Government should specifically indentify what documents it requests" and should "subpoena the third party consultants directly" is equally unpersuasive. Plaintiff does identify several examples of documents-*that it is aware of*-which were created by third party consultants, and Plaintiff has in fact subpoenaed those consultants. Defs.' Resp. at 4. However, there may be additional documents, or additional third party consultants, of which Plaintiff is completely unaware. Without an exhaustive privilege log, Plaintiff would be unable to "specifically indentify" all documents to which it believes it is entitled.

CONCLUSION

For the reasons set forth above, Plaintiff's motion to compel is granted. On or before June 9, 2010, Defendants are directed to produce a privilege log for all documents and communications created on or before January 1, 2008.

SO ORDERED.

E.D.N.Y.,2010.
U.S. v. Bouchard Transp.
Not Reported in F.Supp.2d, 2010 WL 1529248 (E.D.N.Y.)

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Only the Westlaw citation is currently available.

United States District Court, E.D. North Carolina, Western Division.
WESTCHESTER SURPLUS LINES INSURANCE COMPANY, Plaintiff,
v.
CLANCY & THEYS CONSTRUCTION COMPANY, Defendant.

No. 5:12–CV–636–BO.
Nov. 15, 2013.

Jessica Cobaugh Tyndall, Law Office of Benjamin G. Brown, Jr., Joseph Douglas Budd, Gregory Wenzl Brown, Brown Law LLP, Raleigh, NC, for Plaintiff.

Allen Holt Gwyn, Conner Gwyn Schenck PLLC, Greensboro, NC, Eugene F. Rash, Smith, Currie & Hancock LLP, Charlotte, NC, Kirk D. Johnston, Smith, Currie & Hancock LLP, Atlanta, GA, for Defendant.

ORDER

JAMES E. GATES, United States Magistrate Judge.

***1** This case comes before the court on the motion (D.E.71) by defendant Clancy & Theys Construction Company ("Clancy") to compel production of documents from plaintiff Westchester Surplus Lines Insurance Company ("Westchester"). The motion has been fully briefed and referred to the undersigned for disposition pursuant to 28 U.S.C. § 636(b)(1)(A). (*See* Minute Entry following D.E. 81). For the reasons set forth below, the motion will be allowed in part and denied in part.

BACKGROUND

I. PRE–LITIGATION PROCEEDINGS

Clancy, a construction company, was in a joint venture that served as the general contractor for a student housing project in Raleigh, North Carolina. Clancy purchased an insurance policy issued by Westchester relating to the project. In September 2011, foundation settlement problems developed on the project. On 15 September 2011, Clancy notified its insurance broker of the settlement problems, by which it apparently believed it was submitting a claim under the policy to Westchester. Westchester's lead adjuster, Daniel Frazier ("Frazier"), requested that Clancy provide additional information about the matter.

On 18 January 2012, a Clancy officer wrote Westchester a letter asking it to finalize its investigation and issue a coverage opinion. (18 Jan. 2012 Ltr. (D.E.72–2) 1)). The letter states that it was written "in an effort to avoid litigation—both with the project participants [*e.g.*, subcontractors] and our carriers. It is not our desire to litigate any portion of this loss." (*Id.* at 2). Clancy copied three of its attorneys on the email transmitting the letter to Westchester. (D.E. 78–4 at 2).

There ensued a series of exchanges between the parties. On 26 March 2012, counsel for Clancy wrote Westchester asking it to "immediately assume Clancy's defense and become an active participant in resolving this matter in mediation [with the subcontractors]." (D.E. 72–3 at 2). The letter further requested that Westchester issue a coverage determination if it elected not to assume Clancy's defense and stated that Clancy was "writing this letter in an effort to avoid litigation." (*Id.* at 3). Westchester prepared correspondence dated 14 May 2012, provided to Clancy informally later that month, in which it explained its position that Clancy had no coverage under the policy because, among other reasons, the joint venture, as opposed to Clancy, was not an insured under the policy. (D.E. 72–4 at 20–24). Clancy's counsel responded by letter dated 14 June 2012 explaining Clancy's view on coverage. (*Id.* at 26–33). On 15 August 2012, Westchester sent a letter to Clancy's counsel stating that it had "re-evaluated its tentative coverage position" and would continue to investigate the

claim subject to reservation of all its rights. (*Id.* at 37). Finally, on 12 September 2012, Clancy's counsel wrote Westchester with a final demand for a coverage determination and gave notice of bad faith, threatening suit. (12 Sept. 2012 Ltr. (D.E.72–5)).

II. LITIGATION PROCEEDINGS

***2** On 28 September 2012, Westchester commenced this case seeking a declaratory judgment that it has no duty to defend or indemnify Clancy or the joint venture under the policy. (Compl.(D.E.1)). Clancy denied the material allegations of the complaint and asserted counterclaims for breach of contract and bad faith. (Ans. & Countercl. (D.E.22)).

On 13 March 2013, Clancy served on Westchester its first set of requests for production of documents (D.E.72–6). While Westchester produced a number of documents in response to the requests, it withheld others on work product, attorney-client privilege, and other grounds. (*See* Resp. to Prod. Reqs. (D.E.72–7)). Westchester produced an initial privilege log (D.E.72–8) and later a superseding, supplemental privilege log (D.E.72–14).

After attempts to resolve disputes over Westchester's production were unsuccessful, notwithstanding additional production by Westchester, Clancy filed the instant motion to compel, which both parties briefed. (D.E.72, 77). On 28 October 2013, the court entered an order (D.E.86) requiring Clancy to supplement its memorandum to clarify ambiguities in its submissions. Clancy has now filed a supplemental memorandum (D.E.104) and Westchester a supplemental memorandum (D.E.106) in response.

By its motion, Clancy seeks production of the documents listed in Exhibit P (D.E.72–16) to its motion. They can be divided into three groups: Westchester's claim file, its Claims Loss Report ("CLR"), and communications among four designated Westchester employees—Frazier, Larry Hinkel ("Hinkel"), Richard Mastronardo ("Mastronardo"), and Bryan Doyle ("Doyle") [FN1] —prior to 12 September 2012. As to communications, Clancy expressly seeks any attachments without redaction. (Ex. P). Although not clearly stated by Clancy, it appears to contend that these groups of documents were all requested in Production Requests Nos. 1 and 3 of its first set of requests for production. Production Request No. 1 seeks Westchester's claim file and Production Request No. 3 all communications by or to claims adjusters, claims management personnel, and others concerning the documentation of the evaluation of Clancy's claim and decisions regarding the claim. (Prod.Reqs.Nos.1, 3).

FN1. Notwithstanding Clancy's inclusion in Exhibit P of Doyle as the fourth person whose communications it seeks (Ex. P., cat. no. 3), in its memorandum it lists Robert Owens ("Owens") as the fourth person. (Clancy's Mem. 8, 9 (misidentifying "Exhibit P" as "Exhibit R")). In its, supplemental memorandum, Clancy at two points again lists Owens as the fourth person. (Clancy's Supp. Mem. 5, 8; *see also* Westchester's Supp. Mem. 5). Clancy does so although the heading for the discussion of this group of documents lists the fourth person as Doyle, as in Exhibit P. (*Id.* at 5). The court will treat the listing in Exhibit P as controlling not only because of Clancy's repeated statements that it is seeking the documents listed in Exhibit P, but its attachment of Exhibit P to its proposed order allowing the motion (D.E.72–18). Thus, the listing in Exhibit P appears to be the listing that most accurately reflects Clancy's intent as to the documents it seeks by its motion.

DISCUSSION

I. STANDARDS GOVERNING DISCOVERY GENERALLY

The Federal Civil Rules enable parties to obtain information by serving requests for discovery on each other, including requests for production of

documents. *See generally* Fed.R.Civ.P. 26–37. Rule 26 provides for a broad scope of discovery:

> Parties may obtain discovery regarding any non-privileged matter that is relevant to any party's claim or defense.... For good cause, the court may order discovery of any matter relevant to the subject matter involved in the action. Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence.

Fed.R.Civ.P. 26(b)(1). The rules of discovery, including Rule 26, are to be given broad and liberal construction. *Herbert v. Lando*, 441 U.S. 153, 177 (1979); *Nemecek v. Bd. of Governors*, No. 2:98–CV–62–BO, 2000 WL 33672978, at *4 (E.D.N.C. 27 Sep. 2000).

***3** While Rule 26 does not define what is deemed relevant for purposes of the rule, relevance has been " 'broadly construed to encompass any possibility that the information sought may be relevant to the claim or defense of any party.' " *EEOC v. Sheffield Fin. LLC*, No. 1:06CV889, 2007 WL 1726560, at *3 (M.D.N.C. 13 Jun. 2007) (quoting *Merrill v. Waffle House, Inc.*, 227 F.R.D. 467, 473 (N.D.Tex.2005)). The district court has broad discretion in determining relevance for discovery purposes. *Watson v. Lowcountry Red Cross*, 974 F.2d 482, 489 (4th Cir.1992). The party resisting discovery bears the burden of establishing the legitimacy of its objections. *Brey Corp. v. LQ Mgmt., L.L.C.*, No. AW–11–cv–00718–AW, 2012 WL 3127023, at *4 (D. Md. 26 Jul. 2012) ("In order to limit the scope of discovery, the 'party resisting discovery bears the burden of showing why [the discovery requests] should not be granted.' ") (quoting *Clere v. GC Servs., L.P.*, No. 3:10–cv–00795, 2011 WL 2181176, at *2 (S.D. W. Va. 3 June 2011)). In addition, the court may limit the extent of discovery otherwise allowable where "the burden or expense of the proposed discovery outweighs its likely benefit, considering the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the action, and the importance of the discovery in resolving the issues." Fed.R.Civ.P. 26(b)(2)(C)(iii); *see also Basile Baumann Prost Cole & Assocs., Inc. v. BBP & Assocs. LLC*, No. WDQ–11–2478, 2013 WL 1622001, at *3 (D. Md. 9 Apr. 2013) ("Further, '[a]ll discovery is subject to the [proportionality] limitations imposed by Rule 26(b)(2)(C).' " (quoting Fed.R.Civ.P. 26(b)(1))).

Rule 34 governs requests for production of documents. *See generally* Fed.R.Civ.P. 34. A party asserting an objection to a particular request "must specify the part [to which it objects] and permit inspection of the rest." Fed.R.Civ.P. 34(b)(2)(C). In addition, where the objection asserted is one of privilege, a party must expressly assert it in response to the particular discovery request involved and serve with its discovery responses a privilege log in conformance with Fed.R.Civ.P. 26(b)(5)(A). Failure to timely serve a privilege log meeting the requirements of Rule 26(b)(5)(A) may be deemed a waiver of the privilege otherwise claimed. *Mezu v. Morgan State Univ.*, 269 F.R.D. 565, 577 (D.Md.2010) ("Absent consent of the adverse party, or a Court order, a privilege log (or other communication of sufficient information for the parties to be able to determine whether the privilege applies) must accompany a written response to a Rule 34 document production request, and a failure to do so may constitute a forfeiture of any claims of privilege.").

Rule 37 allows for the filing of a motion to compel discovery responses. *See* Fed.R.Civ.P. 37(a)(3)(B)(iv).

II. WESTCHESTER'S CLAIMS OF WORK PRODUCT PROTECTION AND ATTORNEY–CLIENT PRIVILEGE

***4** Westchester asserts the work product doctrine and attorney-client privilege as the basis for withholding documents in each of the three groups of documents at issue. The court will therefore address these claims first, before turning to a separate discussion of each of these groups.

A. Work Production Protection

1. *Applicable Legal Principles*

The work product doctrine, as codified in Rule 26(b)(3)(A) of the Federal Rules of Civil Procedure , is based on the Supreme Court's seminal decision in *Hickman v. Taylor*, 329 U.S. 495 (1947), and protects against the disclosure of certain materials "prepared in anticipation of litigation or for trial by or for [a] party or its representative (including the ... party's attorney, consultant, surety, indemnitor, insurer, or agent)." Fed.R.Civ.P. 26(b)(3)(A). The proponent of work product protection has the burden of establishing its applicability. *Sandberg v. Va. Bankshares, Inc .*, 979 F.2d 332, 355 (4th Cir.1992). "The party seeking protection must make this showing with a specific demonstration of facts supporting the requested protection, preferably through affidavits from knowledgeable persons." *E.I. Du Pont de Nemours and Co. v. Kolon Industries, Inc.*, No. 3:09cv58, 2010 WL 1489966, at *3 (E.D. Va. 13 Apr. 2010) (internal quotations omitted).

" 'The application of the work product doctrine is particularly difficult in the context of insurance claims.' " *Gilliard v. Great Lakes Reinsurance (U.K.) PLC*, No. 2:12–cv–00867–DCN, 2013 WL 1729509, at *2 (D.S.C. 22 Apr. 2013) (quoting *Kidwiler v. Progressive Paloverde Ins. Co.*, 192 F.R.D. 536, 541–42 (N.D.W.Va.2000)); *Schwarz & Schwarz of Va., L.L.C. v. Certain Underwriters at Lloyd's London*, No. 6:07cv00042, 2009 WL 1043929, at *2 (W.D.Va. 17 Apr. 2009) ("With respect to work product claims by insurance companies, '[t]he nature of the insurance business requires an investigation prior to the determination of the insured's claim.' ") (quoting *State Farm Fire & Cas. Co. v. Perrigan*, 102 F.R.D. 235, 237 (W.D.Va.1984)); *Miller v. Pruneda*, No. 3:02–CV–42, 2004 WL 3951292, at *5 (N.D. W. Va. 5 Nov. 2004) ("Because an insurance company is in the business of investigating claims, investigatory files are normally prepared in the ordinary course of the insurance company's business although the files were prepared with an eye toward reasonably foreseeable litigation."); *Pete Rinaldi's Fast Foods, Inc. v. Great Am. Ins. Cos.*, 123 F.R.D. 198, 202 (M.D.N.C.1988) ("Because an insurance company has a duty in the ordinary course of business to investigate and evaluate claims made by its insureds, the claims files containing such documents usually cannot be entitled to work product protection."). "[T]here is no bright-line test for when work product protection applies for insurance companies, and instead courts must undertake a case-by-case analysis." *Botkin v. Donegal Mut. Ins. Co.*, No. 5:10cv00077, 2011 WL 2447939, at *3 (W.D.Va. 15 Jun. 2011). Generally, an insurance company is permitted to assert that there existed a reasonable threat of litigation such that the information prepared from that point forward could be considered "in anticipation of litigation" only after the insurance company has made a decision with respect to the claim. *Pete Rinaldi's*, 123 F.R.D. at 202 ("[I]f the insurer argues it acted in anticipation of litigation before it formally denied the claim, it bears the burden of persuasion by presenting specific evidentiary proof of objective facts demonstrating a resolve to litigate."); *see also Botkin*, 2011 WL 2447939, at *3 (noting that the "pivotal point" in deciding when the activity changes from ordinary business to anticipation of litigation is "when the probability of litigation becomes 'substantial and imminent,' or stated otherwise, when litigation becomes 'fairly foreseeable' ") (quoting *State Farm*, 102 F.R.D. at 237)); *Schwartz & Schwartz*, 2009 WL 1043929, at *3 (finding that work product production attached only after insurance company disclaimed coverage).

2. *Analysis*

***5** Westchester claims work product protection for various documents created on and after 18 January 2012. The documents listed in the supplemental privilege log for which work product protection alone is expressly claimed are those in categories nos. 4 to 8, 22, and 27. Work product protection as well as the attorney-client privilege is expressly claimed with respect to the documents in categories

nos. 9 to 21, 23, 25, and 26. The latest date for any document in the supplemental privilege log is 10 July 2012. (*See* Supp. Priv. Log 19, Bates Nos. 01–001389 to 01–001390). Clancy argues that Westchester is withholding on the basis of the work product doctrine other documents not listed in the supplemental privilege log.

Clancy challenges Westchester's claim of work product protection on the principal grounds that Westchester could not be deemed to have anticipated litigation until Clancy's 12 September 2012 bad faith letter. Westchester counters that Clancy's 18 January 2012 request for a coverage determination constituted a "veiled threat to sue Westchester," which, coupled with Clancy's retention of counsel, gave it grounds to believe that litigation was imminent. (Westchester's Mem. 2).

The court does not find Westchester's argument persuasive. Indeed, as late as 15 August 2012, Westchester wrote to Clancy that it was re-evaluating its coverage position and would continue to investigate the claim. Thus, as of August of 2012, over six months after the January date that Westchester now asserts as the date it anticipated litigation, Westchester was still investigating and evaluating the claim in its ordinary course of business. The fact that Clancy's counsel assisted with preparation of the January 2012 letter does not dictate the conclusion that the prospect of litigation was then substantial and imminent. *Connecticut Indem. Co. v. Carrier Haulers, Inc.*, 197 F.R.D. 564, 571 (W.D.N.C.2000) (denying work product protection to documents created by insurance company prior to denial of claim and finding that "neither retaining legal counsel nor failing to do so is conclusive proof of whether a party has 'resolved to litigate' "). At his deposition, Frazier confirmed that Westchester did not anticipate litigation until Clancy's 12 September 2012 bad faith letter. (*See* Frazier Dep. (D.E.72–1) 85:14 to 88:22).

The court concludes that Westchester has not met its burden of establishing the applicability of work product protection to documents created before 12 September 2012. With respect to the documents for which work product protection is claimed in the supplemental privilege log, which, again, were dated as late as 10 July 2012, the claim of such protection will therefore be overruled. To the extent, if any, that Westchester is withholding any documents sought in Exhibit P that were generated between 10 July 2012 and 11 September 2012 on the basis of work product protection, Westchester waived such protection for these documents by not including them in the supplemental privilege log. In sum, the court will allow the portion of Clancy's motion seeking production of the pre–12 September 2012 documents to the extent they are included in Exhibit P and are being withheld on work product grounds.

B. Attorney–Client Privilege

1. *Applicable Legal Principles*

***6** The attorney-client privilege exists when (1) there is an attorney-client relationship, (2) the communication in question relates to a fact that the attorney learned from the client, outside the presence of strangers, for the purpose of securing a legal opinion or legal services, and (3) the privilege has been claimed and not waived. *See Hawkins v. Stables*, 148 F.3d 379, 383 (4th Cir.1998). The attorney-client privilege is designed "to encourage full and frank communications between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice." *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981). "The burden is on the proponent of the attorney-client privilege to demonstrate its applicability." *United States v. Jones*, 696 F.2d 1069, 1072 (4th Cir.1982). If a party demonstrates that the attorney-client privilege applies, all communications between attorney and client are entitled to absolute and complete protection from disclosure. *In re Allen*, 106 F.3d 582, 600 (4th Cir.1997).

Similar to work product, application of the attorney-client privilege can be complicated in the

context of insurance claims. In *Allen*, 106 F.3d at 602–03, the Fourth Circuit instructed that "not all communications between an attorney and client during attorney-conducted investigations constitute legal work entitled to attorney-client privilege. For example, no privilege attaches when an attorney performs investigative work in the capacity of an insurance claims adjuster, rather than as a lawyer." *Id.; Connecticut Indem. Co.*, 197 F.R.D. at 571 (holding that because attorney's involvement in fact-finding or investigation of insurance claim was related to rendition of legal services, attorney-client privilege applied). In addition, communications prepared in the ordinary course of business cannot be cloaked with the privilege merely by sending copies to in-house counsel. *See Brainware, Inc. v. Scan–Optics, Ltd.*, No. 3:11cv755, 2012 WL 2872812, at *3 (E.D. Va. 12 Jul. 2012) ("The fact that an attorney is copied on these emails does not make them about 'legal matters.' ").

2. *Analysis*

Westchester expressly claims the attorney-client privilege alone with respect to the document listed in category no. 24 in Exhibit P and the attorney-client privilege along with work product protection with respect to the documents listed in categories nos. 9 to 21, 23, 25, and 26. Clancy argues that Westchester is withholding on the basis of attorney-client privilege other documents not listed in the supplemental privilege log.

Clancy challenges Westchester's claims of attorney-client privilege on the grounds, among others, that the documents were prepared in the ordinary course of business and merely copied to in-house counsel and that in-house counsel was performing investigative work. Westchester maintains that the documents "relate to, constitute, and describe legal advice given and received" and are not discoverable. (Westchester's Mem. 7). The nature of each allegedly privileged document is described more particularly in the supplemental privilege log.

***7** The court cannot determine definitively from the record whether the documents for which Westchester claims the attorney-client privilege in the supplemental privilege log are, in fact, protected by the privilege. Westchester will therefore be required to submit these documents for *in camera* inspection. To the extent, if any, that Westchester is withholding any documents sought in Exhibit P on the grounds of attorney-client privilege that are not listed in the supplemental privilege log, it has waived the privilege and will be required to produce them.

III. WESTCHESTER'S CLAIM FILE

Clancy seeks Westchester's "entire" claim file, which is maintained in electronic form, including all "logs, diaries, evaluations, substantive notes, internal communications, and reports" and "all information contained under tabs titled 'Master,' 'Section,' 'Comments,' 'Diary,' 'Documents,' and any other hyperlinks to other documents or information." (Ex. P, cat. no. 1). Although listed as a single category, category no. 1, in Exhibit P, the claim file apparently contains other documents listed in Exhibit P, including the CLR; at least some of the communications among Frazier, Hinkel, Mastronardo, and Doyle; and the documents in categories nos. 22, 26, and 27. The claim file may also contain other documents not specifically identified in Exhibit P.

Westchester opposes Clancy's motion with respect to the claim file, in part, on the grounds that portions of it are protected from disclosure by the work product doctrine and/or the attorney-client privilege, including the document in category no. 26 (*see* Westchester's Supp. Mem. 3 [FN2]; Supp. Priv. Log 19 (entry for Bates No. 01–001546)). As discussed, the claim of work product protection is meritless, and the purportedly attorney-client privileged documents listed in the supplemental privilege log will be reviewed *in camera.*

FN2. Westchester misidentifies this document as the last entry in its supplemental privilege log and cites to a nonexistent document in discussing it (*i.e.*, D.E. 102–3).

Westchester also argues that it previously produced portions of the claim file. Obviously, to the extent it has done so, it will not be required to produce them again.

Lastly, Westchester argues that it need not produce portions of the claim file because Clancy already has the information in such portions, apparently from other materials produced in discovery. The happenstance that Clancy already has such information, even if true, is not a valid ground for withholding those portions of the claim file. *See, e.g.*, *Puccio v. Sclafani*, No. 12–61840–CIV, 2013 WL 4068782, at *2 (S.D. Fla. 12 Aug. 2013) (" '[T]he fact that [a party's counsel] may already possess ... some of the documents and information included in [his] discovery requests ... does not excuse the [responding party's] failure to fully respond to the discovery requests.' " (quoting *Rivers v. Asplundh Tree Expert Co .*, No. 5:08cv61/RS/EMT, 2008 WL 5111300, at *4 (N.D. Fla. 3 Dec. 2008))). In sum, Westchester will be required to produce the portions of its claim file not already produced, subject only to preserved claims of attorney-client privilege.

IV. CLR

***8** Clancy seeks the CLR, "in its original and amended forms," which it characterizes as providing a good summary of the claim. (Ex. P, cat. no. 2). While the CLR itself is listed as a separate category in Exhibit P, category no. 2, Westchester contends it is made up of the documents in categories nos. 4 to 8.

Westchester states that it "has produced all of the information contained within the [CLR] except for information that is protected from disclosure by the work product doctrine and attorney-client privilege." (Westchester's Supp. Mem. 5). It goes on to say, however, that it has listed the CLR "and all copies of it" on its privilege log and that the CLR "is protected from disclosure, and Clancy's motion to compel the [CLR] should be denied." (*Id.*). In these latter statements, there is no mention of portions of the CLR being producible. Thus, on the one hand, Westchester states that portions of the CLR are producible and have been produced and, on the other, that the entire CLR is protected from disclosure.

The court deems Westchester to be stating that it has withheld portions of the CLR because, even though they are not protected from disclosure, Clancy already has the information contained in them from other materials. As in the case of the claim file, the fact that Westchester already has any such information, even if true, is not a valid objection to producing the portions of the CLR that are not subject to the work product doctrine or attorney-client privilege.

Further, while Westchester cites to both the attorney-client privilege and the work product doctrine as protecting the CLR, the supplemental privilege log indicates that it asserts only the work product doctrine as to the documents it claims make up the CLR. (*See* Westchester's Supp. Mem. 5; Supp. Priv. Log 1–3 (entries for Bates Nos. 01–000556 to 01–000557, 01–000561 to 01–000562, 01–000569 to 01–000570, 01–000575 to 01–000576, 01–000582 to 01–000583, 01–000556)). As previously discussed, the claim of work product protection is meritless. Westchester will accordingly be ordered to produce the CLR, provided that if it should determine that portions of it are subject to a claim of privilege preserved in its supplemental privilege log, it may submit those portions for *in camera* inspection.

V. COMMUNICATIONS AMONG WESTCHESTER PERSONNEL

This group of documents sought by Clancy consists of "[a]ll communications between Daniel Frazier, Larry Hinkle [sic], Richard Mastronardo and/or Bryan Doyle, prior to September 12, 2012." (Ex. P, cat. no. 3). This group is listed as category no. 3 in Exhibit P, but it also includes categories nos. 4 to 21 and 23 to 25 and possibly additional documents not listed.

Westchester contends that it has already pro-

duced all documents in this group that are properly producible and that it has withheld documents subject to the work product doctrine and/or the attorney-client privilege. The court will not, of course, require Westchester to make the same production twice, is overruling the claim of work product protection, and will permit *in camera* review of documents as to which the claim of attorney-client privilege has been preserved in the supplemental privilege log.

***9** Westchester also argues that this group of documents includes some not encompassed by any of Clancy's production requests. The court disagrees.

Production Request No. 3 sought: "[a]ll Communications by or to claims adjusters, claims management personnel, in-house consultants, in-house counsel, and any other employee or outside consultant Westchester or any other company of Westchester *concerning the Documentation of evaluation of the claim and all Documentation of decisions taken with respect to the claim.*" (Prod.Req. No. 3) (emphasis added). The production requests define "Communication" and "Documentation" expansively to include "all tangible and electronic forms of human expression, however recorded and reproduced," providing numerous examples. (Prod. Reqs. 3, Definition No. 1).

Westchester argues that Production Request No. 3 is narrower than the group of communications Clancy now seeks because the emphasized language—"concerning the Documentation of evaluation of the claim and all Documentation of decisions taken with respect to the claim"—limits the production request to only substantive communications, whereas the group as described in Exhibit P does not. Westchester elaborates that its personnel store what they deem to be substantive emails in its Apollo System. Emails not deemed by the personnel to be substantive are not transferred to the Apollo System, but are retained in the regular email system, Outlook. Thus, the argument goes, only emails in the Apollo System are kept in the ordinary course of business and are producible. In response to Production Request No. 3, Clancy contends, and Westchester does not refute, that it produced only documents in the Apollo System and did not look for responsive communications in Outlook. (*See* Clancy's Supp. Mem. 5–8 (citing Hinkel Dep. 47:8 to 49:12); Westchester's Supp. Mem. 5–7 (stating, *e.g.* at p. 7, "Westchester has complied with its discovery obligations by producing all non-privileged communications contained in the Apollo System")).

The court believes Westchester is interpreting Production Request No. 3 too narrowly. The clear intent of the request is to encompass any communications generated in the course of consideration of Clancy's claim, whether or not an adjuster considering the claim deemed them to have substantive value. Substantive value for evaluation of a claim is not synonymous with relevance for purposes of discovery in a lawsuit. Westchester's production obligation was not limited to documents kept in the ordinary course of business, but to documents within its possession, custody, or control. *See* Fed.R.Civ.P. 34(a)(1). Indeed, it is difficult to see how Westchester fulfilled its obligation to make reasonable inquiry for the communications sought in Production Request No. 3 by simply acquiescing in its personnel's determination of substantive value without conducting, through counsel, a review of the emails and other documents in Outlook for discovery purposes.[FN3] *See* Fed.R.Civ.P. 26(g)(1).

> FN3. Westchester also candidly admits that because Production Request No. 3 sought, in part, communications with its in-house counsel, it objected "and refused to produce any materials." (Westchester's Supp. Mem. 6). Its action appears to be in clear violation of Rule 34, which provides that "[a]n objection to part of a request must specify the part and *permit inspection of the rest.* " Fed.R.Civ.P. 34(b)(2)(C) (emphasis added).

***10** While category 2 in Exhibit P does not ex-

pressly limit the requested communications to those concerning Clancy's claim, that limitation is necessarily implicit in it given the scope of Production Request No. 3. Therefore, subject to its *in camera* review of the communications sought in this group as to which Westchester has claimed attorney-client privilege in its supplemental privilege log, Westchester will be required to produce the requested communications among Westchester's personnel concerning Clancy's claim.

VI. EXPENSES

The court finds that an award of expenses to either party would be unjust. *See* Fed.R.Civ.P. 37(a)(5). The court therefore declines to award any expenses incurred in connection with the motion.

CONCLUSION

For the foregoing reasons, IT IS ORDERED that Clancy's motion (D.E.71) to compel is ALLOWED IN PART and DENIED IN PART on the following terms:

1. Westchester shall produce, by 27 November 2013, the following documents within its possession, custody, or control, subject to the exceptions set out in paragraph 2 below:

a. Westchester's entire claim file, including all logs, diaries, evaluations, substantive notes, internal communications, and reports, and all portions of the tabbed sections thereof, including but not limited to all documents in categories nos. 22, 26, and 27 in Exhibit P;

b. The CLR, in its original and amended forms, including but not limited to all documents in categories nos. 4 to 8 in Exhibit P;

c. All communications among Daniel Frazier, Larry Hinkel, Richard Mastronardo, and/or Bryan Doyle prior to 12 September 2012 concerning the claim by Clancy at issue in this case, including but not limited to all documents in categories nos. 4 to 21 and 23 to 25 in Exhibit P; and

d. Attachments to all emails or other communications included in the foregoing subparagraphs a, b, or c.

2. Westchester may withhold from the production otherwise required in paragraph 1 above only the following:

a. Documents or portions thereof as to which Westchester has asserted a claim for attorney-client privilege in its supplemental privilege log; and

b. Copies of any documents previously produced in discovery in this case, provided they were produced in the same form (*i.e.*, electronic, paper) and organized in the same manner as they would be required to be produced pursuant to paragraph 1 but for their prior production.

3. Westchester shall serve with the production ordered herein a supplemental response to Clancy's requests for production of documents, duly signed by counsel, identifying by Bates number each additional document being produced and each production request and each category in Exhibit P to which the document is responsive. The supplemental response shall also identify by Bates number each document being withheld from production on the grounds that it is protected by the attorney-client privilege and the production request and category in Exhibit P to which the document relates. For each document being withheld from production on the grounds that Westchester has previously produced a copy (in the same form and organized in the same manner), Westchester shall identify by Bates number the copy it previously produced and the production request and category in Exhibit P to which the document relates.

***11** 4. Any documents that Westchester withholds from production based on a claim of attorney-client privilege pursuant to paragraph 2.a above shall be submitted to the Clerk's office in electronic form by 27 November 2013 for *in camera* review. Westchester shall contact Civil Case Manager Macy Fisher (919–645–1700) for specific instruc-

tions on submission.

5. Westchester may not withhold from the production otherwise ordered herein any documents on the basis of work product protection, whether or not such protection is claimed in the supplemental privilege log, or on the basis of attorney-client privilege if such privilege is not claimed in the supplemental privilege log.

6. Each party shall bear its own costs and expenses incurred in connection with this motion.

SO ORDERED.

E.D.N.C.,2013.
Westchester Surplus Lines Ins. Co. v. Clancy & Theys Const. Co.
Slip Copy, 2013 WL 6058203 (E.D.N.C.)

END OF DOCUMENT

Only the Westlaw citation is currently available.

United States District Court, D. Hawai'i.
Ernestine Ching YOUNG, et al., Plaintiffs,
v.
CITY AND COUNTY OF HONOLULU, et al., Defendants.

Civil No. 07–00068 JMS–LEK.
July 8, 2008.

David A. Nakashima, Lerisa L. Heroldt, Alston Hunt Floyd & Ing, Honolulu, HI, for Plaintiffs.

Don S. Kitaoka, Kyle K. Chang, Office of Corporation Counsel, Lori–Ann KimieKoseki Sunakoda, Department of Corporation Counsel, Honolulu, HI, for Defendants.

DISCOVERY ORDER
ORDER DENYING PLAINTIFFS' MOTION TO COMPEL PRODUCTION OF DOCUMENTS

LESLIE E. KOBAYASHI, United States Magistrate Judge.

***1** On November 26, 2007, Plaintiffs Ernestine Ching Young, et al. ("Plaintiffs") filed the instant Motion to Compel Production of Documents ("Motion"). Defendant City and County of Honolulu ("the City") filed its memorandum in opposition on December 20, 2007 and Plaintiffs filed their reply on December 27, 2007. This matter came on for hearing on January 7, 2008. Appearing on behalf of Plaintiffs was David Nakashima, Esq., and appearing on behalf of the City were Don Kitaoka, Esq., and Kyle Chang, Esq. On April 4, 2008, this Court orally announced its denial of the Motion and that it would issue a written order to that effect. After careful consideration of the Motion, supporting and opposing memoranda, and the arguments of counsel, Plaintiffs' Motion is HEREBY DENIED for the reasons set forth below.

BACKGROUND

Plaintiffs own leasehold, residential condominium units in the Admiral Thomas Apartments in Honolulu ("Admiral Thomas"). Plaintiffs and the City entered into contracts to allow Plaintiffs to purchase the fee interest for their respective units ("the Contracts") pursuant to Chapter 38 of the Revised Ordinances of Honolulu 1990 ("Chapter 38"). Plaintiffs were all properly qualified and designated under Chapter 38 and the Rules of Residential Condominium Cooperative and Planned Development Leasehold Conversion.

On May 8, 2003, the City initiated an eminent domain action regarding the Admiral Thomas in state court pursuant to Chapter 38 ("the Condemnation Action"). During the pendency of the Condemnation Action, Honolulu City Council ("Council") Member Mike Gabbard introduced Council Bill 04–53 (2004), which provided for the repeal of Chapter 38 ("Bill 53"). On or about January 5, 2005, Council Member Charles Djou introduced a modified version of Bill 53 which would have exempted leasehold condominium developments that were validly designated for fee conversion before Bill 53's effective date or that had a sufficient number of lessees who had lease fee purchase contracts with the City before Bill 53's effective date. The Council's Executive Matters Committee ("EMC") rejected Djou's draft on January 13, 2005.

After that vote, Council Member Romy Cachola asked James Mee, Esq ., who represented the lessors of the Admiral Thomas and other properties, to clarify his proposed amendments to Bill 53. Mee informed the EMC that his suggested modification would clarify that only the units designated by the City and approved by the Council would be exempt. Council Member Barbara Marshall expressed concern with Mee's proposed "savings clause" and asked to hear from the attorneys representing the lessees: "I'd like to hear from the other side. I'm a little leery about taking **a recommendation** of an attorney from one side of an issue this controversial **which** I believe **contradicts**

advice of our own counsel...." [Mem in Supp. of Motion at 6 (quoting Exh. 5 to Motion) (emphases in original).] Joachim Cox, Esq., attorney for the Kahala Beach Apartment lessees responded that Mee's savings clause would prevent additional individuals from going forward, even if they had a contract with the City. He also argued that repealing Chapter 38 would constitute a breach of the contracts held by the lessees at the Kahala Beach Apartments and the Admiral Thomas.

***2** The Council ultimately adopted a version of Bill 53 containing Mee's savings clause and Mayor Mufi Hannemann approved and signed Bill 53 into law. It became Honolulu City Ordinance 05–001 ("the Repeal Ordinance"). Plaintiffs contend that the Repeal Ordinance unnecessarily bars qualified and designated applicants who had already begun the process to purchase the fee interests for their units. For example, five Admiral Thomas unit owners were designated by the City in 2004, but the Council refused to approve them before the adoption of the Repeal Ordinance ("Group Three Plaintiffs"). They are now barred from joining ongoing condemnation actions. The state court dismissed Condemnation Action because the Group Three Plaintiffs could not join.

Plaintiffs filed the instant action on February 8, 2007. Their First Amended Complaint, filed February 26, 2007, alleges *inter alia*, that: Chapter 38 should be construed to apply to them because its repeal violates their constitutional rights; and the City breached the Contracts.

On May 29, 2007, Plaintiffs sent two discovery requests to the City. The City objected, claiming that the requested information was protected by the attorney-client privilege, legislative immunity, and the deliberative process privilege. After the parties submitted letter briefs on these issues, this Court issued a Discovery Order on October 9, 2007. This Court ordered the City to conduct a good faith search for responsive documents and to create a privilege log for any documents the City believed were privileged. The Court instructed the parties to meet and confer on the issue and to submit any documents that the City still refused to produce for the Court's *in camera* inspection. The City did so and, on November 6, 2007, this Court issued another Discovery Order, which required the City to produce some of the documents referenced in its privilege log. The Court, however, found that the remainder of the documents were protected from discovery based on the privileges that the City asserted.

In the instant Motion, Plaintiffs seek an order compelling the City to produce various documents referenced in its privilege log. [Mem. in Supp. of Motion at 3 (listing documents by Bates stamp numbers).] Plaintiffs argue that the City waived all claims of privilege as to any and all documents referring, relating, and/or regarding legal advice about Mee's savings clause because Council Member Marshall voluntarily disclosed the fact that the adoption of Mee's savings clause contradicted the advice of the Council's attorneys. According to Plaintiffs, this disclosure waived the deliberative process privilege because the disclosure of material and/or information to persons or entities outside the government constitutes a waiver. They emphasize that her voluntary disclosure was on the record and is available to the public. Further, it was more than a vague allusion to privileged information; she summarized a significant portion of the legal advice. Plaintiffs also contend that Council Member Marshall had the authority to waive the deliberative process privilege, and other privileges, for the Council. Moreover, none of the other Council members objected to or took steps to rectify her disclosure. The City's current objections, almost three years after the fact, does not render the matter privileged.

***3** Plaintiffs also argue that Council Member Marshall's disclosure waived the attorney-client privilege. Pursuant to the fairness doctrine, the City cannot disclose as much of counsel's advice as it pleases and withhold the remainder. Under Ninth Circuit law, a voluntary disclosure of privileged at-

torney communication waives the privilege as to all other communication on the same subject. Plaintiffs contend that courts interpret the same subject requirement broadly and that communications between the City and its attorneys regarding the adoption of Mee's savings clause are clearly the same subject matter as Council Member Marshall's disclosure.

Finally, Plaintiffs argue that the disclosure waived the protection of the work product doctrine. Council Member Marshall made the disclosure during a public meeting with many people in the audience who opposed Bill 53 and Mee's savings clause. Thus, the disclosure substantially increased the opportunity for the City's adversaries to obtain information about legal advice that the Council obtained, and the disclosure was inconsistent with maintaining the secrecy of the legal advice. In addition, Plaintiffs have a substantial need for the information because whether the Council rejected contrary legal advice in adopting the Repeal Ordinance is relevant to the issue whether the impairment of the Contracts was reasonable and necessary to fulfill an important public purpose.

In its memorandum in opposition to the Motion, the City argues that Council Member Marshall did not have the authority to waive privileges for the Council. The City argues that, under state law, a single member of the Council can only waive privileges for the Council when she has actual or apparent authority to do so. Similarly, under federal law, a council member will not be found to have waived others' privileges unless there is evidence that she had authority to do so. The City asserts that there is no evidence that Council Member Marshall had actual or apparent authority to waive the Council's or the City's privileges.

The City also argues that, even assuming, *arguendo,* that Council Member Marshall had the required authority, she did not waive the deliberative process privilege because she did not disclose a significant portion of the legal advice. Her statement that she believed the adoption of Mee's savings clause was contrary to the advice of counsel did not divulge the substance of any legal advice. The City also stresses that no documents regarding counsel's advice were disseminated in this case.

With regard to the attorney-client privilege, the City emphasizes that Marshall did not disclose any legal research, theories, impressions, or conclusions. Further, even assuming, *arguendo,* that Marshall's statements waived her individual protection arising from the work product doctrine, the City's Department of the Corporation Counsel ("Corporation Counsel"), which gave advice as legal counsel for the City, is also protected. The City argues that Council Member Marshall could not waive Corporation Counsel's protection.

***4** In their reply, Plaintiffs assert that Council Member Marshall's statements, taken in context, reveal the substance of Corporation Counsel's legal advice. Plaintiffs also point out that the City did not address the complete lack of timely objection to or rectification of Marshall's disclosure. Since courts strictly construe the attorney-client privilege, even an inadvertent disclosure constitutes a waiver, particularly where there is a failure to object or rectify the consequences. Plaintiffs clarify that they do not argue that Marshall's statements waived the Council's attorney-client privilege as to all documents concerning Bill 53. Finally, with regard to the work product doctrine, Plaintiffs note that the City did not refute Plaintiffs' substantial need for the discovery.

DISCUSSION

Federal Rule of Civil Procedure 26(b)(1) provides, in pertinent part: "Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense[.]" In the instant Motion, Plaintiffs seek documents referring or relating to Corporation Counsel's legal advice about Mee's savings clause. This Court reviewed these documents *in camera* and ruled in its November 6, 2007 Discovery Order that the documents were protected by the deliberative process privilege, the attorney-client privilege, and the attorney

work product doctrine, as the City asserted. Plaintiffs argue that Council Member Marshall waived these protections with her disclosure during the public session. The City argues that the protections belong to the Council and the City and that Marshall did not have the authority to waive them.

Federal Rule of Evidence 501 states:

> Except as otherwise required by the Constitution of the United States or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience....

Thus, federal law controls the applicable privileges where jurisdiction is based on a federal question. *See City of Rialto v. United States Dep't of Def.*, 492 F.Supp.2d 1193, 1197 n. 3 (C.D.Cal.2007) (citing *Kerr v. U.S. Dist. Court for the N. Dist. of Calif.*, 511 F.2d 192, 197 (9th Cir.1975)). While Plaintiffs also have a pendent state law contract claim, federal law privilege still applies. *See* Fed.R.Evid. 501 advisory committee's note (1974 Enactment) ("[i] t is also intended that the Federal law of privileges should be applied with respect to pendent State law claims where they arise in a Federal question case").

I. *Deliberative Process Privilege*

Federal law recognizes a deliberative process privilege, the purpose of which is " 'to allow agencies freely to explore possibilities, engage in internal debates, or play devil's advocate without fear of public scrutiny.' " *Carter v. United States Dep't of Commerce*, 307 F.3d 1084, 1088–89 (9th Cir.2002) (quoting *Assembly of Cal. v. United States Dep't of Commerce* ("*Assembly* "), 968 F.2d 916, 920 (9th Cir.1992)) (some citations omitted). In other words, it ensures that government agencies do not have to operate in a fishbowl. *See id.* at 1090. The privilege protects " 'documents reflecting advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated.' " *Id.* at 1089 (quoting *Dep't of Interior v. Klamath Water Users Protective Assoc.*, 532 U.S. 1, 8, 121 S.Ct. 1060, 149 L.Ed.2d 87 (2001)).

***5** A document falls within the deliberative process privilege if it is predecisional and deliberative. *See id.*

> "A predecisional document is one prepared in order to assist an agency decisionmaker in arriving at his decision, and may include recommendations, draft documents, proposals, suggestions, and other subjective documents which reflect the personal opinions of the writer rather than the policy of the agency. A predecisional document is a part of the deliberative process, if the disclosure of [the] materials would expose an agency's decisionmaking process in such a way as to discourage candid discussion within the agency and thereby undermine the agency's ability to perform its functions."

Carter, 307 F.3d at 1089 (quoting *Assembly*, 968 F.2d at 920) (some citations and quotation marks omitted). This Court has ruled that the City properly asserted the deliberative process privilege with respect to the disputed documents.

A. *Waiver*

Plaintiffs argue that Council Member Marshall's statements constituted a waiver of the deliberative process privilege with regard to the requested documents. The City argues that Council Member Marshall did not have the authority to waive the deliberative process privilege on behalf of the City and, even if she did, her statements did not constitute a waiver.

The Court need not address whether Council Member Marshall had the authority to waive the deliberative process privilege because the Ninth Circuit does not consider prior disclosure of information to constitute a waiver of the deliberative pro-

cess privilege because " '[a]gencies should not be penalized for openness.' " *See Carter*, 307 F.3d at 1091 (quoting *Assembly*, 968 F.2d at 922–23 n. 5 (alteration in original). Courts should only consider prior disclosures "to determine whether the disclosure would expose the decision-making process any more than it has already been disclosed." *Id.* Thus, the issue is whether the disclosure of the requested documents would expose the Council's decision-making process more than Council Member Marshall's statements did.

Council Member Marshall essentially stated that she believed that Mee's savings clause contradicted Corporation Counsel's advice. Her statements did not provide any details about the advice and only reflected her beliefs about such advice. The Court finds that disclosure of the requested documents would expose the Council's decision-making process more than Council Member Marshall's statements did and therefore her statements do not negate the deliberative process privilege.

B. *Overcoming the Deliberative Process Privilege*

The deliberative process privilege, however, is a qualified privilege. *See F.T.C. v. Warner Commc'ns Inc.*, 742 F.2d 1156, 1161 (9th Cir.1984). A litigant may overcome the privilege if his need for the materials and the interest in accurate fact-finding outweighs the government's interest in non-disclosure. *See id.* Among the factors that courts may consider in making this determination are: "1) the relevance of the evidence; 2) the availability of other evidence; 3) the government's role in the litigation; and 4) the extent to which disclosure would hinder frank and independent discussion regarding contemplated policies and decisions[;]" *see id.* (citations omitted); "5) the interest of the litigant, and ultimately society, in accurate judicial fact finding, (6) the seriousness of the litigation and the issues involved, (7) the presence of issues concerning alleged governmental misconduct, and (8) the federal interest in the enforcement of federal law." *N. Pacifica, LLC v. City of Pacifica*, 274 F.Supp.2d 1118, 1122 (N.D.Cal.2003) (citation omitted).

***6** The interest in accurate fact finding always weighs in favor of disclosure. *See id.* at 1124. In the present case, the City's role as the sole defendant, the federal interest in the enforcement of Plaintiffs' federal constitutional rights, and the seriousness of the litigation and the issues involved weigh in favor of disclosure. Further, as in *North Pacifica*, "the decisionmaking process of the City Council is by no means collateral to the litigation; indeed, the decisionmaking process is not swept up into the case, it *is* the case." *Id.* (citation and quotation marks omitted) (emphasis in original).

The Court, however, finds that Corporation Counsel's legal advice about Mee's savings clause is of limited relevance to the instant case because the courts are able to determine the legal issues involved in this case without such evidence. To the extent that the documents sought contain factual information about the Council's consideration of Mee's savings clause, the Court finds that comparable evidence is available in the Council's public record and the other documents that the City previously disclosed. The availability of comparable evidence from other sources is arguably the most important factor in determining whether the moving party has overcome the deliberative process privilege. *See id.* Finally, the Court finds that compelling the City to disclose documents containing Corporation Counsel's legal advice about Mee's savings clause would hinder frank and independent discussions of bills pending before the Council. The Council members would likely be discouraged from any discussion of Corporation Counsel's advice about pending legislation if this Court were to find that a general reference like Council Member Marshall's statements would require the disclosure of all documents relating to Corporation Counsel's advice on the issue.

Thus, having considered the relevant factors, the Court finds that the City's interest in non-disclosure outweighs Plaintiffs' interest in disclosure and that Plaintiffs have not overcome the deliberative process privilege.

III. *Attorney-client Privilege and Work Product Doctrine*

This Court ruled in its November 6, 2007 Discovery Order that the City properly asserted the attorney-client privilege and the work product doctrine with regard to the documents at issue here. The Court therefore turns to Plaintiffs' argument that these protections have been waived.

If a privileged communication is disclosed to someone outside the attorney-client relationship, the privilege is waived as to communications about the matter actually disclosed, and intent (or lack thereof) to waive the attorney-client privilege is not dispositive. *See Tennenbaum v. Deloitte & Touche*, 77 F.3d 337, 341 (9th Cir.1996) (citing *Weil v. Investment/Indicators, Research & Management*, 647 F.2d 18 (9th Cir.1981)). A court may then deem an "express waiver" or "waiver by voluntary disclosure", as referred to by some commentators in order to distinguish this type of waiver from an "implied waiver," or "waiver by claim assertion". *See Bittaker v. Woodford*, 331 F.3d 715, 719 n. 4 (9th Cir.2003) (citations omitted). For instance, such waiver would occur where documents are turned over to a third party not bound by the privilege. The Ninth Circuit has stated that a waiver of attorney-client "applies equally to the work product privilege, a complementary rule that protects many of the same interests." *Id* . at 722 n. 6 (citing *Upjohn Co. v. United States*, 449 U.S. 383, 400, 101 S.Ct. 677, 66 L.Ed.2d 584 (1981)).

***7** Plaintiffs argue that Council Member Marshall's disclosure during a public session constitutes an express waiver of the attorney-client privilege and the work product doctrine. The City counters that these protections belong to the City and the Council and that Council Member Marshall did not have the authority to waive them. This Court agrees.

An agent acting within the scope of her authority can waive a corporation's privilege. *See Interfaith Housing Delaware, Inc. v. Town of Georgetown*, 841 F.Supp. 1393, 1399 (D.Del.1994); *see also Commodity Futures Trading Comm'n v. Weintraub*, 471 U.S. 343, 348, 105 S.Ct. 1986, 85 L.Ed.2d 372 (1985) ("[T]he power to waive the corporate attorney-client privilege rests with the corporation's management and is normally exercised by its officers and directors."). Thus, a corporation's president can make statements waiving the corporation's attorney-client privilege, as a mayor can for a city. *See Interfaith Housing*, 841 F.Supp. at 1399. A corporate president and a mayor "have clear leadership positions which give them authority to bind their respective principals. One can reasonably assume a mayor or corporate president has the authority ... to waive the attorney-client privilege." *Id.* (citations omitted). In contrast, a reasonably prudent person would not assume that a single member of a city or town council has the authority to waive privileges on behalf of the city or town without evidence of such authority. *See id.; see also United States v. Ferrell*, No. CR07–0066MJP, 2007 WL 2220213, at *3 (W.D.Wash. Aug.1, 2007) ("It is generally agreed that the [attorney-client] privilege belongs to the government agency, and not an individual government employee. 'The privilege for governmental entities may be asserted or waived by the responsible public official or body.' " (quoting Restatement Third, Law Governing Lawyers § 74, Comment e)); *N. Pacifica*, 274 F.Supp.2d at 1126 n. 3 (stating that, even where a city council member willingly testified about his or her uncommunicated motivations, the court would not rule that this waived the deliberative process privilege because "the privilege is held by the body and not the individual legislator" (citing *Nissei Sangyo Am. v. IRS*, No. 95–1019 (TFH/PJA), 1997 U.S. Dist. LEXIS 22473, at *20, 1997 WL 1091466 (D.D.C. May 8, 1997) (noting that privilege belongs to government))).

In the present case, Plaintiffs have not presented any evidence establishing that individual Council members, or Council Member Marshall in particular, have the authority to make legal decisions on behalf of the City. The Court therefore finds that Council Member Marshall did not have the author-

ity to waive the attorney-client privilege or the protection of the work product doctrine on behalf of the City or the Council. Council Member Marshall's statements therefore did not constitute a waiver of the attorney-client privilege or the protection of the work product doctrine.

In light of the Court's findings, the Court need not address the remainder of Plaintiffs' arguments.

CONCLUSION

***8** On the basis of the foregoing, Plaintiffs' Motion to Compel Production of Documents, filed November 26, 2007, is HEREBY DENIED.

IT IS SO ORDERED.

D.Hawai‘i,2008.
Young v. City and County of Honolulu
Not Reported in F.Supp.2d, 2008 WL 2676365 (D.Hawai'i)

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