UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 1:16-CV-21199-CMA/O'Sullivan

ANDREA ROSSI, *et al.*,

Plaintiffs,

v.

THOMAS DARDEN, *et al.*,

Defendants,
_____/

PLAINTIFFS' MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS' MOTION FOR A PROTECTIVE ORDER RELATING TO ATTORNEY-CLIENT PRIVILEGED COMMUNICATONS AND INCORPORATED MEMORANDUM OF LAW

Plaintiffs, Andrea Rossi ("Rossi") and Leonardo Corporation ("Leonardo"), by and through their undersigned counsel, hereby respond in opposition to Defendants, Thomas Darden ("Darden"), John T. Vaughn ("Vaughn") IPH International, B.V. ("IPH") and Cherokee Investment Partners, LLC's ("Cherokee") Motion for a Protective Order Relating to Attorney-Client Privileged Communications and Incorporated Memorandum of Law [DE No. 138] and state:

INTRODUCTION

Defendants have withheld, under the guise of the attorney-client privilege, approximately 388 communications that involve non-party John Mazzarino and various other employees employed under the Cherokee umbrella of entities. Despite ample opportunity to prove that such communications are protected by the attorney-client privilege, Defendants have failed to meet their burden to do so and must either produce those communications to Plaintiffs or submit them to the Court for *in camera* review.

MEMORANDUM OF LAW

The attorney-client privilege protects those communications "between a lawyer and a client not intended to be disclosed to third persons other than those to whom disclosure is in furtherance of the rendition of legal services, or those reasonably necessary for the transmission of the communication." *Tyne v. Time Warner Entm't Co., L.P.*, 212 F.R.D. 596, 597 (M.D. Fla. 2002) (citing § 90.502(1)(c), Fla. Stat.). The privilege "extends to agents and representatives *of the attorney* when disclosure is in furtherance of the rendition of legal services, or when disclosure is reasonably necessary for the transmission of the communication." *Id*. at 598 (citing § 90.502(1)(c)(1-2), Fla. Stat.) (emphasis added). The privilege "protects only those disclosures necessary to obtain informed legal advice which might not have been made absent the privilege." *Fisher v. United States*, 425 U.S. 391, 403 (1976).

The common interests privilege[1] "enables litigants who shared *unified* interests to exchange privileged information to adequately prepare their cases without losing the protection afforded by the privilege." *Visual Scene, Inc. v. Pilkington Bros.*, 508 So. 2d 437, 440 (Fla. 3d DCA 1987) (emphasis added); *see also Developers Sur. & Indem. Co. v. Harding Vill., Ltd.*, No. 06-21267-CIV-COOKE-BROWN, 2007 U.S. Dist. LEXIS 49994, at *4 (S.D. Fla. July 11, 2007). Florida courts consider three threshold questions in determining whether the attorney-client and common interests privileges apply to communications:

> (1) whether the original disclosures were necessary to obtain informed legal advice and might not have been made absent the attorney-client privilege;
>
> (2) whether the communication was such that disclosure to third parties was not intended; and

[1] The common interests privilege is also referred to as the common interests exception, the joint defense doctrine, etc. *See Visual Scene, Inc. v. Pilkington Bros.*, 508 So. 2d 437, 440 (Fla. 3d DCA 1987). For purposes of this brief, Plaintiffs use "common interests privilege" to refer to the concept that the three titles each and collectively comprise.

> (3) whether the information was exchanged between the parties for the limited purpose of assisting in their common cause.

Developers Sur., 2007 U.S. Dist. LEXIS 49994, at *4-5 (citing *Fisher*, 425 U.S. at 403; *Visual Scene*, 508 So. 2d at 441). Defendants here cannot satisfy any of the three elements.

Florida courts have held that the "most important question is whether the information was exchanged for the limited purpose of assisting in the parties' common, litigation-related cause." *Infinite Energy, Inc. v. Econnergy Energy Co.*, No. 1:06CV124-SPM/AK, 2008 U.S. Dist. LEXIS 63493, at *4 (N.D. Fla. July 23, 2008) (citing *Developers*, 2007 U.S. Dist. LEXIS 49994, at *3; *Visual Scene*, 508 So.2d at 441). In other words, the privilege applies only "when persons share a common *legal* interest, not when the primary common interest is a joint business strategy that happens to include a concern about litigation." *Id*. (citations omitted) (emphasis added). The burden of proof "rests squarely on the party claiming the attorney-client privilege to show that the primary purpose of the communication in question was for the purpose of obtaining legal advice, not business advice. *In re Denture Cream Prods. Liab. Litig.*, No. 09-2051-MD-ALTONAGA/SIMONTON, 2012 U.S. Dist. LEXIS 151014, at *35-39 (S.D. Fla. Oct. 18, 2012).[2] The burden of proving the privilege "always rests in the final analysis with the party seeking the protecting of the privilege." *Maplewood Partners, L.P. v. Indian Harbor Ins. Co.*, 295 F.R.D. 550, 584 (S.D. Fla. 2013).

[2] *See also Carpenter v. Mohawk Indus., Inc.*, No. 4:07-CV-0049-HLM, 2007 U.S. Dist. LEXIS 98135, 2007 WL 5971741, at *9 (N.D. Ga. Oct. 1, 2007) ("When advice given by an attorney relates to both business and legal matters, the legal advice must predominate in order for the attorney-client privilege to apply."); *Hasty v. Lockheed Martin Corp.*, No. Civ. A. 98-1950, 1999 U.S. Dist. LEXIS 12373, 1999 WL 600322, at *2 (E.D. La. Aug. 6, 1999) ("[T]he business aspects of [a corporate] decision are not protected simply because legal considerations are also involved;" and, "in those cases where the document does not contain sufficient information to indicate whether the material was considered confidential, that material should not be privileged.").

ANALYSIS

Defendants maintain that communications originating after the creation of Industrial Heat that involve Mr. Mazzarino and other Cherokee employees are protected by the attorney-client privilege because Defendant Darden, Mr. Mazzarino, and Cherokee employees share certain "common interests." Those interests, as Defendants state them, include: "protecting and properly structuring their financial investments in Industrial Heat"; "protecting their investment, which is obviously threatened by this litigation"; "the defense litigation with Plaintiffs Rossi and Leonardo"; and "ensuring that their respective joint investments in Industrial Heat bear fruit." [ECF No. 138 at 5-6, 10, 13.] As discussed below, these so-called "common interests" are business interests that do not entitle Defendants to exclude otherwise privileged materials from discovery.

A. Mr. Mazzarino Shares Common Business Interests, Rather Than Legal Interests, With Defendants Industrial Heat and Darden.

The first question Florida courts consider when determining the common interests privilege is "whether the original disclosures were necessary to obtain informed legal advice and might not have been made absent the attorney-client privilege." The Court need only look to Mr. Mazzarino's own testimony to determine that disclosures to Mr. Mazzarino were not necessary for Defendants Darden or Industrial Heat to obtain legal advice. *See Developers Sur.*, 2007 U.S. Dist. LEXIS 49994, at *4-5

As Mr. Mazzarino testified in his deposition, he is not now, nor has he ever been, an officer, director, manager, or employee of Industrial Heat. *See* Mazzarino Aff. ¶ 8; Mazzarino Depo. Tr. at 60:9-11 ("I'm an investor in this entity…. I've never held an operating position in this company. I'm not a manager of it. I'm not involved in the … day-to-day."). Mr. Mazzarino did not make business, management, or operating decisions at Industrial Heat. *See* Mazzarino Depo. Tr. at 232:7-9. Nor was Mr. Mazzarino involved in making legal or legal strategy decisions on behalf

of Industrial Heat. *See* Mazzarino Depo. Tr. at 243:21-244:6 (Q. "[D]o you know who at … Industrial Heat … was responsible for making legal decisions or legal strategy decisions on behalf of Industrial Heat? A. Yes. It would be the remaining senior management and Schell Bray. Q. And the other senior management, that would be Tom Darden and J.T. Vaughn? A. Yes. Q. Anybody else? A. Not that I can think of."); 232:21-24 (Q. Did you play a role in being a go-between between Industrial Heat's lawyers and Industrial Heat? A. No. Consistent with what I've said before, I was episodically involved.").

In addition, Mr. Mazzarino was never tasked with any specific formal responsibilities for Industrial Heat. *See id*. at 68:24-69:2 ("Again, to be clear … there were no specific responsibilities that I had with respect to Industrial Heat."). Nor did he devote any substantial portion of his time to Industrial Heat. *Id*. at 60:14-18 ("But my responsibilities reside elsewhere. My day-to-day role resides elsewhere, which is managing the funds. That's what I'm supposed to do. That's where I spend the absolute majority of my time."). In fact, Mr. Mazzarino's daily responsibilities have been, and continue to be, predominantly centered in the Cherokee entities. *Id*. at 61:1-5 ("In addition to that, I'm running the management – I'm running the organization which provides all those [fund] services. All right? And so my responsibilities have been, and continue to be, predominantly toward managing the fund."). At most, Mr. Mazzarino's involvement with Industrial Heat was, and is, limited to being a co-founder and investor, and to "trying to be helpful as an investor." *Id*. at 60: 12-14 ("I'm an investor like everybody else."); 110:16-17 ("I'm one investor out of many. This is one deal out of many.") Mazzarino Aff. ¶8.

Given Mr. Mazzarino's limited role in Industrial Heat after its formation, including his hands-off approach to allowing and trusting Defendants Darden and Vaughn to run the company

and make business or legal decisions, it is clear that none of the disclosures made to Mr. Mazzarino were necessary to obtain legal advice.

Turning to the second question that Florida courts ask – "whether the communication was such that disclosure to third parties was not intended" – Defendants clearly intended to disclose arguably otherwise privileged communications to Mr. Mazzarino regardless of the fact that Mr. Mazzarino played no role in the corporate form of Industrial Heat. *See Developers Sur.*, 2007 U.S. Dist. LEXIS 49994, at *4-5. Defendants or counsel copied Mr. Mazzarino in his personal capacity on numerous emails that Defendants claim are subject to privilege.

Finally, the Court must consider "whether the information was exchanged for the limited purpose of assisting in the parties' common, litigation-related cause." The burden of showing that the primary purpose of any questioned communication "rests squarely on the party claiming the attorney-client privilege." There is no question that the parties' shared interests were business interests, rather than legal interests. *See Infinite Energy*, 2008 U.S. Dist. LEXIS 63493, at *4. As a preliminary matter, Mr. Mazzarino is not a defendant in the pending action and is not an officer, director, or manager of Industrial Heat. Defendants have not showed how being an investor in a company equates to having a legal interest in any litigation involving the company. Instead, Defendants summarily conclude that because Mr. Mazzarino is an investor, he has a legal interest in common with the named Defendants in this case.

Furthermore, Defendants fail to show how any of the other interests that they share in common with Mr. Mazzarino are legal, rather than business interests. For example, Defendants assert that they and Mazzarino have a common interest in "ensuring that their respective joint investments in Industrial Heat bear fruit." [ECF No. 138 at 13.] Defendants provide no support for the proposition that ensuring that a company is profitable is a legal interest, rather than a

business interest. This logic is absurd, for if followed, all communications to any shareholders would then fall under the umbrella of this expanded privilege. Similarly, Defendants assert that they and Mr. Mazzarino share a common interest in "protecting their investment, which is obviously threatened by this litigation." [ECF No. 138 at 10.] By definition, this is a business interest; the fact that one can use the law to accomplish that goal does not turn the goal into a legal interest. Yet Defendants fail to provide any support for the proposition that such an interest is recognized under Florida law. Indeed, Florida courts have held that the privilege protection does not apply where the "primary common interest is a joint business strategy that happens to include a concern about litigation." *In re Denture Cream Prods. Liab. Litig.*, 2012 U.S. Dist. LEXIS 151014, at *35-39 (citing I*nfinite Energy*, 2008 U.S. Dist. LEXIS 63493, at *4). As the burden rests on Defendants to prove that the privilege applies, they must do more than state legal conclusions.

Because Defendants have not met their burden of showing that their common interests with Mr. Mazzarino were common legal, rather than business, interests, Defendants have failed to make their case that communications involving Mr. Mazzarino fall within the common interests privilege.

B. Defendants have failed to meet their burden of showing that Cherokee employees share a common legal interest with Defendants.

As noted *supra*, the burden of proving the attorney-client privilege "always rests in the final analysis with the party seeking the protection of the privilege." *Maplewood Partners, L.P. v. Indian Harbor Ins. Co.*, 295 F.R.D. 550, 584 (S.D. Fla. 2013). Defendants' attempt to meet that burden with respect to the Cherokee employees misses the mark. Not only do Defendants fail to analyze their common interests privilege claim using the threshold questions that Florida courts

pose, but they fail to provide anything more than conclusory allegations that certain employees are simply protected by the privilege.

First, Defendants have failed to clarify the nature and relationship of the Cherokee employees in question such that either the Court or Plaintiffs could determine whether disclosures were necessary to obtain informed legal advice and might not have been made absent the attorney-client privilege." *See Infinite Energy*, 2008 U.S. Dist. LEXIS 63493, at *4. Defendants have not stated that any particular employee played a role that required consultation with legal counsel, the dissemination of legal advice, or the carrying out of any legal directive. At most, Defendants provide the Court with the unsubstantiated conclusion that disclosures to Cherokee employees were required to maintain the separation of corporate entities. [ECF No. 138 at 13.]

In addition, Defendants have failed to analyze the second factor that Courts consider in determining whether the common interests privilege applies – "whether the communication was such that disclosure to third parties was not intended." *See Developers Sur.*, 2007 U.S. Dist. LEXIS 49994, at *4-5. Without even the conclusory allegation that disclosure was not intended, Defendants cannot meet their burden with respect to this question.

Finally, the sole "common interest" that Defendants have identified with respect to Defendants and Cherokee employees is the interest in "maintaining corporate separateness." [ECF No. 138 at 13.] Aside from calling it a "legal interest," and pointing out that legal questions "may arise" if corporate entities blur together, Defendants have failed to show that – to the extent that such an interest exists – it relates to any common, litigation-related cause rather than a joint business strategy that includes some concern about litigation. *See Infinite Energy*, 2008 U.S. Dist. LEXIS 63493, at *4.

Defendants' failure to meet their burden of showing that Cherokee employees share a common legal interest with Defendants is fatal to their assertion of privilege. *See, e.g.*, *Maplewood Partners*, 295 F.R.D. at 584; *In re Denture Cream Prods.*, 2012 U.S. Dist. LEXIS 151014, at *35-39.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court order Defendants to produce the more than 388 communications involving Mr. Mazzarino and other Cherokee employees or conduct an *in camera* review of such emails to determine which communications are subject to the attorney-client privilege and which communications are not so subject.

Dated: February 21, 2017.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served by in the manner specified below on February 21, 2017 on all counsel or parties of record on the attached Service List.

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