UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

ANDREA ROSSI, et al.,	)	
	)	
Plaintiffs,	)	
v.	)	No. 16-cv-21199-CMA (JJO)
	)	
THOMAS DARDEN, et al.,	)	
	)	
Defendants.	)	
	)	

DEFENDANTS' REPLY MEMORANDUM OF LAW REGARDING ATTORNEY-CLIENT PRIVILEGED COMMUNICATIONS

Defendants Thomas Darden, John T. Vaughn, Industrial Heat, LLC ("Industrial Heat"), IPH International, B.V., and Cherokee Investment Partners, LLC ("CIP") (collectively, "Defendants") submit this Reply to Plaintiffs' Opposition to Defendants' Memorandum of Law Regarding Attorney-Client Privileged Communications.[1] To date, Defendants have produced over 25,188 documents in the discovery process, amounting to over 142,000 pages of information. According to Plaintiffs, the instant dispute concerns 388 documents. Plfs' Opp. at 8. Nothing in Plaintiffs' Opposition calls into serious question Defendants' valid claim of attorney-client privilege and/or work product as to these documents.

As a threshold matter, Plaintiffs' Opposition brief is telling for what it leaves *unanswered* in Defendants' opening brief. As a consequence, Plaintiffs put to rest two categories of emails that may be amongst the 388 purportedly still in dispute.[2] Specifically, Plaintiffs concede that:

---

[1] Defendants' opening brief was styled as a Motion for a Protective Order but the Clerk subsequently advised that, per the Court's instructions, it will be treated as a Memorandum of Law in support of Defendants' attorney-client privilege assertions at the February 7, 2017 discovery hearing.

[2] Plaintiffs do not reveal how they arrived at that number.

(1) Emails between Defendant Darden, his counsel, and officers or employees of CIP, Cherokee Investment Services, Inc. ("CIS"), and/or Cherokee Advisers, LLC ("CA"), including Mr. Mazzarino, **which were created prior to and leading up the formation of Industrial Heat, are protected by the attorney-client privilege** (*see* Defs' Mem. at 5, 6-10; Plfs' Opp. at 4 (exclusively referencing "communications originating after the creation of Industrial Heat")); and

(2) Emails between Defendant Darden, his counsel, and officers or employees of CIP, CIS, and/or CA, including Mr. Mazzarino, **which were created after the formation of Industrial Heat and relate to matters in controversy with Andrea Rossi under the License Agreement and related agreements, including the instant litigation, are protected by the attorney-client privilege and the work product doctrine** (*see* Defs' Mem. at 5, 10-11).

As to the first category, there are over 200 emails that were created prior to the formation of Industrial Heat. Because the parties agree that these are privileged, they are no longer in dispute.

Thus, the sole question still before the Court is whether the balance of the emails are privileged. This *third* category of emails was identified in Defendants' opening Memorandum as "emails between Defendant Darden, his counsel, and officers or employees of CIP, CIS, and/or CA, including Mr. Mazzarino, which were created after the formation of Industrial Heat and relate to legal matters other than the instant litigation." *Id.* at 5, 10-14. As explained below, this category is also protected by the attorney-client privilege.[3]

[3] As relief, Plaintiffs request "*in camera* review" of the remaining documents (at 1). In the event this Court determines that there remains a question as to the applicability of the attorney-client privilege to these documents, Defendants agree that *in camera* review—not an order requiring production—is appropriate. On this subject, Defendants reiterate that the procedural posture of this briefing is unusual in that Plaintiffs have not identified any particular communication(s) on the log for analysis, contrary to the conventional process for putting a privilege dispute before a court. They instead made a blanket objection to Defendants' privilege claims, and now complain in their Opposition that Defendants' factual proffer is insufficient for purposes of the common interest exception for waiver. As Defendants noted in their opening Memorandum (at 5 n.1), Defendants are prepared to supplement the arguments contained herein in the event the dispute is properly narrowed to particular entries on the privilege log. Under the current posture, however, Defendants are left to "shoot fish in a barrel," so to speak, because Plaintiffs have not properly teed up the dispute for resolution as to the particular facts of particular communications. Plaintiffs cannot have it both ways; either Plaintiffs should appropriately narrow their challenge or be held to the less particularized factual showing that their generic objection to Defendants' privilege claims necessitates.

Plaintiffs lodge two challenges to the privilege claims that remain in dispute. First, they argue that the common interest *exception* to the general rule of third-party waiver applies only if the privileged communications are shared with employees or officers *of the client*. To the extent that Mr. Mazzarino was not an officer or employee of Industrial Heat, they argue, attorney conversations with him are not privileged. This is incorrect as a matter of law. Indeed, Plaintiffs' argument would obliterate the common interest exception to waiver. It must therefore be rejected.

Second, Plaintiffs argue that, although Mr. Mazzarino's attorney communications prior to the creation of Industrial Heat are protected by the privilege, they lost their privileged character after the creation of Industrial Heat to the extent that they do not relate to the instant litigation. In making this argument, Plaintiffs again distort the standards governing the common interest exception to waiver. "[D]isclosure to . . . individuals who have a common legal interest does *not* constitute a waiver of the privilege." *Tyne v. Time Warner Entm't Co.*, 212 F.R.D. 596, 600 (M.D. Fla. 2002) (emphasis added). This exception applies here.

DISCUSSION

I. Because the Common Interest Exception to Waiver Necessarily Protects Communications with *Third Parties,* Plaintiffs' Digression into Mr. Mazzarino's Unofficial Status with Industrial Heat Is Completely Beside the Point.

Plaintiffs seek a blanket ruling that emails that post-date the creation of Industrial Heat are *per se* not privileged if Mr. Mazzarino or employees and officers of other Cherokee entities were copied on them. Plaintiffs' primary argument in support of such extraordinary relief is that "Mr. Mazzarino . . . is not now, nor has he ever been, an officer, director, manager, or employee of Industrial Heat." Plfs' Opp. at 4; *see id.* at 6 ("Mr. Mazzarino is not a defendant in the pending action and is not an officer, director, or manager of Industrial Heat."). They repeatedly emphasize that, although Mr. Mazzarino testified that he "'was episodically involved'" in

Industrial Heat, he was not a member of the senior management team. *Id.* at 5 (quoting Mazzarino Depo. Tr. at. 232: 21-24); *see id.* ("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.'") (quoting Mazzarino Depo. Tr. at. 60: 12-14). Plaintiffs accordingly suggest that, unless Mr. Mazzarino is an integral part of Industrial Heat's ongoing management, Defendants cannot satisfy the first prong of the test for invoking the common interest exception to third party waiver of the privilege, *i.e.*, "'whether the original disclosures were necessary to obtain legal advice and might not have been made absent the attorney-client privilege.'" *Id.* at 4 (quoting *Developers Sur. & Indem. Co. v. Harding Village, Inc.*, No. 06-21267-CIV, 2007 WL 2021939, at *2 (S.D. Fla. July 11, 2007)). This argument is flawed as a matter of law.

Plaintiffs cite no authority for the proposition that third parties must be part-and-parcel of the client's management or personnel structure in order to be covered by the common interest exception to the third-party waiver of the privilege. Of course, such a rule would be nonsensical, as the entire point of the exception is to *include* third parties within the scope of privilege protection. In *Developers Sur. & Indem. Co.*, which Plaintiffs cite for the governing standard (at 2-3), the court acknowledged that a common interest can exist as between two entirely separate parties and their respective counsel. 2007 WL 2021939, at *1 (applying joint-defense privilege as an exception to waiver); *see also Tyne*, 212 F.R.D. at 600 (extending privilege "to persons outside the direct employment" of the client). Surely, if the privilege can encompass two wholly distinct parties with a common interest, it can encompass the co-founders of Industrial Heat.

Plaintiffs next suggest that only representatives "*of the attorney*" can fall within the common interest exception to privilege. *See* Plfs' Opp. at 2 (emphasis in original). This argument, once again, makes no sense. Representatives of the attorney are already covered by the privilege on its face—there is no need to consider waiver of the privilege, let alone an

exception to waiver, in order to bring agents of an attorney within the protections of the attorney-client privilege. *See, e.g., Quarles & Brady, LLP v. Birdsall*, 802 So.2d 1205, 1206 (Fla. 2002) (holding that attorney-client privilege applies to law firm secretary in legal malpractice action). Otherwise, entire law firms would be waiving the attorney-client privilege right-and-left as members and staff collaborate on representation of the firms' clients. The privilege, in short, would lose its purpose altogether.[4] Plaintiffs' arguments on this score must therefore be ignored.

II. Plaintiffs Distort the "Confidential Communication" Prong of the Common Interest Exception Beyond Recognition.

Plaintiffs fare no better under the second prong of the common interest exception to third-party privilege waiver—"'whether the communication was such that disclosure to third parties was not intended.'" Plfs' Opp. at 2 (quoting *Developers Surety & Indem. Co.*, 2007 WL 2021939, at *2); *see also id.* at 8.[5] As Defendants anticipated (at 12 n.6), Plaintiffs misconstrue this prong altogether, arguing that it is not satisfied to the extent that "Defendants or counsel copied Mr. Mazzarino in his personal capacity on numerous emails that Defendants claim are subject to the privilege." Plfs' Opp. at 6. If Plaintiffs were correct that a disclosure to third parties "in their personal capacities" precludes application of the exception to third-party waiver, the common interest exception would literally self-destruct. The second prong of the test merely requires courts to identify whether the nature of the communication was such that it was meant to remain confidential *as between the parties to which the privilege-holder claims privilege,* which

[4] Plaintiffs' attempt to repackage the common interest *exception* to waiver as somehow bound up with the core attorney-client privilege inquiry is misleading. *See* Plfs' Opp. at 2 n.1. There is no question that the privilege protects the communications of Tom Darden and his counsel. The issue Plaintiffs raise is whether a waiver occurred and, if so, whether the common interest exception nonetheless extends privilege protection to the communications in dispute.

[5] Plaintiffs oddly assert that Defendants failed to make "even the conclusory allegation that disclosure was not intended." Plfs. Opp. at 8. In fact, Mr. Mazzarino repeatedly states in his sworn affidavit that his communications with Mr. Darden and counsel for Industrial Heat "were intended to remain confidential." Mazzarino Affid. ¶¶ 7, 8, 12.

of course includes any third parties with a common interest under the common interest exception to third-party waiver of the privilege. If disclosure to third parties meant that the exception for disclosure to third parties is inapplicable, the exception would cease to exist altogether—despite Florida statutory law to the contrary. *See Tyne*, 212 F.R.D. at 598-99 (citing Fla. Stat. § 90.502(1)(c) (establishing third-party exceptions to waiver)).

In this case, Plaintiffs do not claim that the emails remaining in dispute were disseminated beyond Mr. Mazzarino and/or others within the Cherokee umbrella of entities. There is therefore no doubt that, as Mr. Mazzarino repeatedly attests, the communications were meant to be confidential. Mazzarino Affid. ¶¶ 7, 8, 12. Just as the attorney-client privilege itself requires confidentiality, the exception requires that communications as between those for which there is a common legal cause remain confidential. Indeed, as the court in *Infinite Energy, Inc. v. Econnergy Energy Co.*, No 1:06CV124-SPM/AK, 2008 WL 2856719, at *2 (N.D. Fla. July 23, 2008) (upon which Plaintiffs rely at 3 & 6) explained, the "the general rule that voluntary disclosure of information to a third party waives the confidentiality attendant to attorney-client communications [exists] because it is inconsistent *with a confidential relationship.*" (Emphasis added). So long as these parties maintained a confidential relationship in their communications, the fact that non-employees/officers of Industrial Heat were included within that confidential relationship is *not* a reason to categorically deny application of the common interest exception.

III. The Common Interest Exception Does Not Require a Showing of Common Legal Interests *to the Exclusion of* Common Business Interests.

Plaintiffs' second complaint about Defendants' remaining attorney-client privilege assertions is that "[t]here is no question that the parties' shared interests were business interests, rather than legal interests." Plfs' Opp. at 6. While Defendants dispute the accuracy of this

statement as a matter of fact, the "either/or" dichotomy that Plaintiffs insist upon is not consistent with Florida law governing the common interest exception to third-party waiver of the privilege.

In *Tyne*, which Plaintiffs make no attempt to distinguish in their Opposition brief, the U.S. District Court for the Middle District of Florida extended attorney-client privilege protection to persons outside of Warner Bros., "including to employees of [other film studios]." 212 F.R.D. at 600. The case was brought by members of the Tyne family who sought damages from the producers of the film, *The Perfect Storm*, for its allegedly negative portrayal of a family member. Applying Florida law, the court concluded that the third-party production companies were covered by the privilege between Warner Bros. and its in-house legal department because the other companies' "employees both solicited and received advice from the Warner Bros. legal department about *how to protect their common legal interests in avoiding liability*." *Id.* (emphasis added).

Here too, Mr. Mazzarino declared under oath that, "[b]ecause Mr. Darden and I are both investors in Industrial Heat, and are both directors of its parent company, we share a common interest in securing a return on our investment *and in avoiding or managing litigation* that could adversely affect our investment." Mazzarino Affid. ¶ 9 (emphasis added). In *Tyne*, the court explained that, "[w]hile employees of [the other companies] may not be clients of the Warner Bros. legal department, Warner Bros. required their cooperation with regard to the production of *A Perfect Storm* in order to protect Warner Bros.' legal interests." 212 F.R.D. at 600. Hence, the court found the common legal interest sufficient by virtue of their joint need to cooperate *in the production of a movie.* The other companies "were involved in a project akin to a 'joint venture' with Warner Bros., and the actions of [their] employees regarding improper clearance would subject Warner Bros. to liability." *Id.*

In this case, as well, "[t]he advice of [Industrial Heat's legal counsel] would be useless to [Industrial Heat] if the advice could not be disseminated to the few key individuals who were intimately involved in the joint [venture of Industrial Heat]." *Id.* Such individuals included—most prominently—the co-founder of Industrial Heat and a director of its parent company, John Mazzarino. In this context, Mr. Mazzarino's role was beyond that of a passive investor interested in company profit. He was involved in making important decisions and collaborated with Mr. Darden and counsel to promote productivity within the company, to develop business and legal strategy, and to protect Industrial Heat from harm—be it legal or otherwise. Thus, his attorney communications involving Industrial Heat are protected under Florida law.[6] Plaintiffs' contrary suggestion that the common interest exception only applies to purely litigation-related advice is flatly belied by case law from this Circuit, which they fail to distinguish.

Plaintiffs rely instead on *In re Denture Prods. Liab. Litig.*, for their argument that the privilege does not apply. Plfs. Opp. at 7.[7] But in that case, the court *upheld* a company's privilege claims and rejected what it called "Plaintiffs' wholesale approach to concluding that certain documents withheld . . . are not privileged based solely upon the fact that the particular document did not reference an attorney, was authored by a non-attorney and/or was disseminated by two non-attorneys." *In re Denture Prods. Liab. Litig.*, No. 09-2051-MD, 2012 WL 5057844, at *13 (S.D. Fla. Oct. 18, 2012). Plaintiffs here likewise attempt a "wholesale approach" to privilege that is even more tenuous than the circumstances in *In re Denture Prods. Liab. Litig.*, *i.e.*, a generic ruling that legal advice cannot be tainted by business concerns under the common

[6] It is important to note that many of the exhibits *Plaintiffs* selected for purposes of examining the corporate representative of Industrial Heat were communications to or from Mr. Mazzarino. *See, e.g.*, Industrial Heat Corp. Rep. Depo Tr. Exhibits 18, 22, 29 and 30. Plaintiffs selection of these communications demonstrate their knowledge that Mr. Mazzarino played an integral role with regards to actions taken by Industrial Heat that are at the crux of this lawsuit.

[7] Undersigned counsel conducted a word search of *In re Denture Prods. Liab. Litig.* but was unable to find the language that Plaintiffs purport to quote from the decision.

interest exception to third party waiver. Yet that court refused to "artificially view[]" the communications "as primarily a business communication merely because the author and recipient were not attorneys." *Id.* In this case as well, the inevitable fact that Mr. Mazzarino, Mr. Darden, and the employees and officers of their other joint entities had common business interests does not eviscerate their collective need for confidential legal advice, which depended upon a common understanding that their communications would be privileged.

As for communications with employees of the other Cherokee entities, Plaintiffs do not dispute that corporate separateness is an important consideration in terms of limiting Industrial Heat's legal liabilities. *See* Defs' Mem. at 13-14 (citing case law). Plaintiffs instead fall back on the circular refrain that business interests must somehow be distinct from legal interests for purposes of the common interest exception—which, as discussed above, is legally incorrect—and suggest that Defendants' factual submission in support of their attorney-client privilege claim is somehow insufficient. *See* Plfs' Opp. at 8 ("Defendants cannot meet their burden").

To begin with, given the awkward procedural posture of this briefing—whereby Plaintiffs eschewed the commonplace procedure of identifying specific privilege log entries and litigating those on the facts of the particular communications at issue—Defendants are hard-pressed to accurately and comprehensively "state[] 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," as Plaintiffs claim they must. *Id.* In the context of a wholesale, global objection to hundreds of entries on the privilege log, Plaintiffs' demand for a particularized showing of privilege as to the remaining entries they dispute would impose an unnecessary burden on their opponents and the Court, thus undermining the important policy rationale behind the attorney-client privilege in the first instance. If an abnormal procedural maneuver could frustrate the

privilege by creating an onerous factual hurdle, would-be clients could not rely on their counsel for legal advice with confidence that such advice will remain confidential in later litigation.

In any event, in an abundance of caution, if this Court sees any merit to Plaintiffs' arguments, it could follow the lead of the court in the *Infinite Energy, Inc.* case, which Plaintiffs cite repeatedly. That court concluded that, although "the prospect of reviewing hundreds of documents is not appealing," it had no option but to conduct *in camera* review to discern "who these persons are that the unspecified communications were taking place between and among." 2008 WL 2856719, at *3. To facilitate that endeavor, the court asked counsel to supplement the record by creating a log that divided the documents for review "into the four categories already discussed and addressed in the memorand[a] of the parties," and that clearly identified "the specific privilege asserted." *Id.* at *4. If this Court decides on a similar course of action, Defendants respectfully request sufficient time to prepare the materials in a manner that will maximize efficient review by the Court.

CONCLUSION

For the foregoing reasons, Defendants respectfully request that the Court uphold Defendants' remaining privilege claims. In the alternative, Defendants request *in camera* review of the emails that remain in dispute.

Dated: February 24, 2017

Respectfully submitted,

/s/ Christopher R. J. Pace

Christopher R.J. Pace
cpace@jonesday.com
Florida Bar No. 721166
Christopher M. Lomax
clomax@jonesday.com
Florida Bar No. 56220
Erika S. Handelson
ehandelson@jonesday.com
Florida Bar No. 91133
Christina T. Mastrucci
cmastrucci@jonesday.com
Florida Bar No. 113013
JONES DAY
600 Brickell Avenue
Brickell World Plaza
Suite 3300
Miami, FL 33131
Tel: 305-714-9700
Fax: 305-714-9799

Attorneys for Defendants/Counter-Plaintiffs

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on February 24, 2017, I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system which will send a notice of electronic filing to all counsel or parties of record.

/s/ *Christopher Lomax*
Christopher Lomax