UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
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BRIAN G. MCNAMEE,

Plaintiff,

- against -

WILLIAM ROGER CLEMENS,

Defendant.
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ORDER

09 CV 1647 (SJ)

On December 12, 2008, plaintiff Brian G. McNamee ("McNamee") commenced this action in the Supreme Court of the State of New York against defendant William Roger Clemens ("Clemens"), claiming that Clemens defamed him by accusing McNamee of lying and manufacturing evidence regarding Clemens' alleged use of performance enhancing drugs. On April 22, 2009, the case was removed to federal court.

Presently before the Court is plaintiff's motion to compel discovery of three categories of documents. For the reasons stated below, the Court grants plaintiff's motion to compel in part and denies it in part.

BACKGROUND

On December 13, 2007, United States Senator George Mitchell released the "Mitchell Report," which included statements by plaintiff McNamee that he had injected defendant Clemens with performance enhancing drugs. (Pl.'s Mem.[1] at 2). Plaintiff alleges that Clemens

[1]Citations to "Pl.'s Mem." refer to Plaintiff's Memorandum of Law in Support of Motion to Compel Discovery, dated August 2, 2013.

"immediately launched a coordinated public relations offensive against McNamee to brand him a liar." (Id.) Clemens also filed a defamation suit against plaintiff McNamee in Texas state court and, according to plaintiff, "obtained from Congress a public hearing to further brand McNamee as a liar." (Id.)

In this current motion, McNamee seeks an Order requiring the production of all communications with Clemens' public relations strategist, Joe Householder ("Householder"), and Householder's firm, Public Strategies, Inc. ("Public Strategies" or the "PR Firm"), which have been withheld from production on grounds of attorney-client privilege and work product. (Pl.'s Mem. at 7; Def.'s Mem.[2] at 10). Clemens' counsel, Rusty Hardin & Associates ("Rusty Hardin"), hired Public Strategies five days after the Mitchell Report was released. (Pl.'s Mem. at 3). According to plaintiff, the contract between Rusty Hardin and Public Strategies provided that the PR Firm would provide consulting services "with respect to media relations advice and counsel." (Id.; Greenberger Aff.,[3] Ex. A[4]). McNamee claims that the services provided by Public Strategies included coordinating an appearance by Clemens on "60 Minutes," issuing press releases, and responding to media inquiries. (Id.) In support of his claim that communications with Public Strategies was privileged, Clemens asserts that Householder was "a full-fledged, yet non-attorney, member of [defendant's] legal team." (Def.'s Mem. at 3-4).

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[2]Citations to "Def.'s Mem." refer to defendant Roger Clemens' Response in Opposition to Motion to Compel Discovery, dated August 10, 2013.

[3]Citations to "Greenberger Aff." refer to the Affirmation of Debra L. Greenberger, Esq., in Support of Plaintiff's Motion to Compel Discovery, filed August 2, 2013.

[4]Citations to "Greenberger Aff., Ex. A" refer to the Consultant Agreement between Public Strategies, Inc. and Rusty Hardin and Associates, PC, dated December 18, 2007.

McNamee also seeks to compel Clemens to produce all communications with Randal ("Randy") Hendricks (Pl.'s Mem. at 7), which have also been withheld from production on grounds of attorney-client privilege and work product. (Def.'s Mem. at 14). According to plaintiff, defendant Clemens employed Hendricks Sports Management ("Hendricks"), which is run by Randy and Alan Hendricks, as his sports agents. (Id. at 4). McNamee claims that Clemens retained Hendricks in 1998 "to assist him in contract negotiations, to provide financial planning and management, and to coordinate endorsement opportunities." (Id.) According to McNamee, the contract between Clemens and his sports agent, Hendricks, "contains no mention of legal services" (id. at 4-5; Greenberger Aff., Ex. H[5]), and Hendricks does not hold itself out as providing legal services. (Id. at 5). Instead, McNamee asserts that, after the Mitchell Report was released, Randy Hendricks[6] "performed 'marketing' services for Clemens. . ., in an attempt to bolster Clemens' reputation by smearing McNamee's." (Id. at 5). For example, Randy Hendricks released a press statement on Clemens' behalf, communicated with the press, and told reporters that he "deferred to Rusty Hardin on legal matters." (Id.) In response, Clemens claims that Randy Hendricks has served as Clemens' legal advisor since 1983, and as "the equivalent of in-house counsel. . .and an active member of the team of attorneys representing Clemens" since 2007. (Def.'s Mem. at 6).

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[5]Citations to "Greenberger Aff., Ex. H" refer to the Hendricks Sports Management Agency Contract with Roger Clemens, signed by Roger Clemens on November 21, 1998.

[6]Plaintiff does not dispute the fact that Randy Hendricks was a lawyer at some point in his career, but contends that he only practiced law over 30 years ago before he left to found Hendricks in the 1970s. (Pl.'s Mem. at 4). Defendant asserts that Mr. Hendricks is currently licensed to practice law in Texas. (Def.'s Mem. at 6).

DISCUSSION

A. Privilege Waiver

As an initial matter, McNamee argues that Clemens' failure to provide a privilege log operates as a waiver of any applicable privilege. (Pl.'s Mem. at 9). Clemens does not dispute the fact that a traditional privilege log was not produced in response to the plaintiff's request for documents, but contends that his assertion of privilege over broad categories of documents as part of his response to plaintiff's discovery requests is sufficient. (Def.'s Mem. at 7).

Federal Rule of Civil Procedure 26(b)(5)(A) requires that a party withholding discovery on the basis that the requested information is privileged or subject to work product protection must "describe the nature of the documents, communications, or tangible things not produced or disclosed – and do so in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the claim." Fed. R. Civ. P. 26(b)(5)(A). Local Civil Rule 26.2(b) "commands, inter alia, that when documents sought. . .are withheld on the ground of privilege, [a privilege log] shall be furnished in writing at the time of the response to such discovery or disclosure, unless otherwise ordered by the court."[7] FG Hemisphere Assocs., L.L.C. v. Republique Du Congo, No. 01 CV 8700, 2005 WL 545218, at *5 (S.D.N.Y. Mar. 8, 2005).

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[7]The required privilege log need not necessarily provide descriptions on a document-by-document basis. Local Civil Rule 26.2(c) encourages any "[e]fficient means of providing information regarding claims of privilege" as agreed to by the parties. Local Civil Rule 26.2(c). For example, the Local Rules specify that, where a party asserts the same privilege with respect to multiple documents, "it is presumptively proper to provide the information required by this rule by group or category." Id. Objections to a privilege log compiled in this manner may be made where "the substantive information required by this rule has not been provided in a comprehensible form." Id. See also Committee Notes to Local Civil Rule 26.2 (noting that "the purpose of Local Civil Rule 26.2(c) is to encourage the parties to explore methods appropriate to each case").

Accordingly, "the starting position is that the privilege log must be served with the objections [to discovery requests]. . .and that the failure to do so may result in waiver of the privilege claims." In re Chevron Corp., 749 F. Supp. 2d 170, 181 (S.D.N.Y.), aff'd sub nom., Lago Agrio Plaintiffs v. Chevron Corp., 409 F. App'x 393 (2d Cir. 2010).

Courts in this Circuit have refused to uphold a claim of privilege "where privilege log entries fail to provide adequate information to support the claim," OneBeacon Ins. Co. v. Forman Int'l, Ltd., No. 04 CV 2271, 2006 WL 3771010, at *5 (S.D.N.Y. Dec. 15, 2006) (citing United States v. Constr. Products Research, Inc., 73 F.3d 464, 473 (2d Cir. 1996)), or where "no privilege log has been produced." Id.; see also Allied Irish Banks, P.L.C. v. Bank of Am., N.A., 252 F.R.D. 163, 167 (S.D.N.Y. 2008) (noting that "[c]ases rejecting claims of privilege based on the inadequacy of the privilege log alone typically involve an absence of basic information. . .or a failure to produce a log at all"); FG Hemisphere Associates, L.L.C. v. Republique Du Congo, 2005 WL 545218, at *6 (citing cases) (holding that "the unjustified failure to list privileged documents on the required log of withheld documents in a timely and proper manner operates as a waiver of any applicable privilege").

Taking into account "all relevant factors," when the party fails to produce an adequate privilege log, it is "within the Court's discretion to grant leniency as to documents which would be covered by [a privilege or protection] except for the waiver." In re Chevron Corp., 749 F. Supp. 2d at 181-82 (noting that Local Rule 26.2 "has not always been enforced rigidly," as some courts "have limited enforcement to situations in which there was no sufficient justification for the failure to produce a log on time or to seek leave to delay"); see also OneBeacon Ins. Co. v. Forman Int'l, Ltd., 2006 WL 3771010, at *8 (observing that granting leniency is "risky," but

nonetheless declining to order production of documents and instead directing the withholding party to submit an appropriate privilege log).

The circumstances of this case warrant a finding that defendant Clemens has waived his claims of privilege and work product protection by virtue of his failure to timely submit a privilege log. Defendant's attorneys are obligated to familiarize themselves with the Local Civil Rules, which are clear as to the requirement to provide a privilege log. See In re Chevron Corp., 749 F. Supp. 2d at 182 (taking into account the clarity of Rule 26.2 as cutting in favor of waiver). Defendant's failure to comply with the Local Rule and provide the required privilege log was brought to his attention by July 9, 2013, when plaintiff filed a request for a pre-motion conference regarding the instant motion to compel. Nevertheless, it was not until this Court issued an Order to produce the withheld documents for in camera review that defendant finally produced a privilege log on August 20, 2013.

Moreover, a review of the privilege log that was produced demonstrates that it continues to fail to satisfy the requirements of the Local Rules. Although defendant is correct that a traditional, document-by-document privilege log is not always required by Local Rule 26.2, in this case, the defendant's written summary continues to lack sufficient information as to the content of the documents to enable plaintiff or the Court to evaluate whether each of the withheld documents is privileged. See Fed. R. Civ. P. 26(b)(5)(A); In re Chevron Corp., 749 F. Supp. 2d at 183; Local Civil Rule 26.2(b) (providing that a privilege log must "be furnished in writing at the time of the response to such discovery or disclosure"). While it may, in some cases, be appropriate to identify purportedly privileged documents by category, Fleisher v. Phoenix Life Ins. Co., 11 CV 8405, 2013 WL 42374, at *3 (S.D.N.Y. Jan. 3, 2013), "broad classes of

documents" with "exceedingly general and unhelpful" descriptions will not satisfy defendant's obligations. Id. The privilege log enclosed with the documents submitted for in camera review lists each document individually and provides each document's date, author, recipients, and subject. However, the subject line contains, in many instances, exceedingly unhelpful descriptions. Examples of such vague subjects include single word descriptions, such as: "tomorrow," "Media," "My info," "statement," "Costs," "Letter," "notes," "Inquiry," and "Discussion."[8] These types of descriptions clearly do not provide sufficient information as to the content of the documents to enable plaintiff or the Court to evaluate whether each of the withheld documents is privileged, as required by Rule 26, and as a consequence, the Court's in camera examination of the records has been seriously impeded.[9]

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[8]Defendant's privilege log is lacking in additional ways. The log lists incorrect Bates numbers for the communications with Randy Hendricks numbered 247-260. Defendant has provided a list of "positions and affiliations of people other than Mr. Clemens named in the log [to] aid" the Court's review. On this list, seven people, including Mr. Householder, are listed as "Consultants," without further explanation. In the absence of a showing that each of these people were integral to the communication of legal advice or litigation strategy, any privileges applicable to communications with them are waived. See Allied Irish Banks, P.L.C. v. Bank of Am., N.A., 252 F.R.D. at 168 (finding that, "[g]enerally, communications made between a defendant and counsel in the known presence of a third party are not privileged").

[9]The Court also notes that defendant has already failed to comply with Rule 26(b)(5)(A) once in connection with his discovery responses in this case. In the Court's May 21, 2013 Order, resolving a separate discovery dispute, the Court noted that a privilege log compiled by the defendant "often group[ed] a broad range of documents together as one document in violation of Federal Rule of Civil Procedure 26(b)(5)(A). For example, more than 900 pages of documents [were] listed as Document Number 6 and described as 'various records provided by the Toronto Blue Jays in response to grand jury subpoena, and court documents from legal proceedings in Canada to obtain the documents.'" Based upon an in camera review of these documents, it became immediately apparent to the Court that this single entry on the log consisted of very different categories of documents, including inter alia, press clippings and published newspaper articles, publicly available team rosters, and internal memoranda, only some of which may have been privileged. The Court Ordered production of the vast majority of the documents and, for the remaining documents, Ordered defendant to revise his privilege log to comply with Rule 26.

Accordingly, the Court finds that Clemens has waived his claims of privilege and work product protection by virtue of his failure to timely submit an adequate privilege log.

B. Privilege/Protection Claims

Even if Clemens had not waived claims of privilege or work product protection as a result of his failure to provide a proper privilege log under the Local Rules, the Court has undertaken the arduous task of reviewing the over 900 pages of documents for which a claim of protection has been raised and has determined that neither protection applies to the vast majority of records.[10]

"The burden of establishing the existence of an attorney-client privilege or work product protection rests with the party asserting the privilege/protection." OneBeacon Ins. Co. v. Forman Int'l, Ltd., 2006 WL 3771010, at *4 (citing In re Grand Jury Proceedings, 219 F.3d 175, 182 (2d Cir. 2000)). The party resisting disclosure carries "the heavy burden of establishing its

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On June 7, 2013, plaintiff informed the Court that defendant had produced all of the documents at issue rather than revise his privilege log.

[10]Had Clemens not waived such claims under the Local Rules, the following documents might potentially be considered privileged or work product depending on a further showing that the documents were prepared as part of litigation strategy and not media strategy — a showing that has not been made in defendant's supporting papers: *Householder in Camera* - 00101, 00102, 00145, 00146, 00328, 00334, 00393, 00402, 00403, 00404, 00405, 00478, 00479, 00480, 00492, 00493, 00494, 00495, 00496, 00572, 00600; *Hendricks in Camera* - 00001, 00034, 00035, 00036, 00037, 00050, 00051, 00052, 00176, 00177, 00178, 00214, 00250, 00251, 00252, 00253, 00300, 00301, 00302, 00303, 00304, 00305, 00306, 00307, 00308. Indeed, for many of these records, additional information and context is required to determine whether claims of privilege or work product protection are valid. The Court also notes that while Document No. 00402 purports to attach litigation documents, none are actually included. The Court further notes that some of the above listed documents appear multiple times throughout the records furnished for in camera review.

applicability, Chevron Corp. v. Salazar, 275 F.R.D. 437, 444 (S.D.N.Y. 2011), which is "not discharged by mere conclusory or ipse dixit assertions." In re Grand Jury Subpoena Dated Jan. 4, 1984, 750 F.2d 223, 224-25 (2d Cir. 1984); see also S.E.C. v. NIR Grp., LLC, 283 F.R.D. 127, 131 (E.D.N.Y. 2012). Rather, any claimed protection "must be narrowly construed[,] and its application must be consistent with the purposes underlying the immunity." Allied Irish Banks, P.L.C. v. Bank of Am., N.A., 252 F.R.D. at 169-69.

1. Attorney-Client Privilege

Since this Court's jurisdiction is based on diversity, "state law provides the rule of decision concerning the claim of attorney-client privilege." Egiazaryan v. Zalmayev, No. 11 CV 2670, 2013 WL 945462, at *4 (S.D.N.Y. Mar. 8, 2013) (citing Fed. R. Evid. 501); Allied Irish Banks, P.L.C. v. Bank of Am., N.A., 252 F.R.D. at 168. In this motion, plaintiff cites New York case law, and although Clemens "expressly reserves his right to rely on" Texas law, he also cites New York law, claiming that "the aspects of privilege law in dispute here are similar in both states." (Def.'s Mem. at n.2). Accordingly, "[i]n these circumstances, the parties have implicitly consented to having New York privilege law apply and this implied consent is sufficient to establish choice of law on the privilege question." Allied Irish Banks v. Bank of Am., N.A., 240 F.R.D. 96, 102 (S.D.N.Y. 2007). See also Wall v. CSX Transp., Inc., 471 F.3d 410, 415 (2d Cir. 2006) (finding that, under New York's conflict of laws approach, "the first step in any case presenting a potential choice of law issue is to determine whether there is an actual conflict between the laws of the jurisdictions involved").

"[T]he attorney-client privilege is one of the 'oldest recognized privileges for confidential

communication' and it is intended to 'encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and the administration of justice.'" Collins v. City of New York, No. 11 CV 766, 2012 WL 3011028, at *3 (E.D.N.Y. July 23, 2012) (quoting Swidler & Berlin v. United States, 524 U.S. 399, 403 (1998)) (internal citations omitted). See also D'Alessio v. Gilberg, 205 A.D.2d 8, 10, 617 N.Y.S.2d 484, 485 (2d Dep't 1994) (finding that the purpose of the attorney-client privilege "is to ensure that one seeking legal advice will be able to confide fully and freely in his attorney").

The attorney-client privilege protects "(1) a communication between client and counsel that (2) was intended to be and was in fact kept confidential, and (3) was made for the purpose of obtaining or providing legal advice." In re County of Erie, 473 F.3d 413, 419 (2d Cir. 2007); Assured Guar. Mun. Corp. v. UBS Real Estate Sec. Inc., No. 12 CV 1579, 2013 WL 1195545, at *9 (S.D.N.Y. Mar. 25, 2013) (applying New York law to a party's claim of attorney-client privilege). "Generally, communications made between a defendant and counsel in the known presence of a third party are not privileged." Allied Irish Banks, P.L.C. v. Bank of Am., N.A., 252 F.R.D. at 168 (citing People v. Osorio, 75 N.Y.2d 80, 84, 549 N.E.2d 1183, 1185 (1989)).

The privilege may be expanded to those assisting a lawyer in representing a client, such as public relations consultants and agents. Haugh v. Schroder Inv. Mgmt. N. Am. Inc., No. 02 CV 7955, 2003 WL 21998674, at *3 (S.D.N.Y. Aug. 25, 2003); In re Grand Jury Subpoenas Dated March 24, 2003 Directed to (A) Grand Jury Witness Firm & (B) Grand Jury Witness, 265 F. Supp. 2d 321, 325 (S.D.N.Y. 2003) (finding that the attorney-client privilege may extend, in appropriate circumstances, to otherwise privileged communications that involve persons assisting the lawyer in the rendition of legal services). However, it is not sufficient that communications

with a PR Firm "prove important to an attorney's legal advice to a client." Calvin Klein Trademark Trust v. Wachner, 198 F.R.D. 53, 54 (S.D.N.Y. 2000). Instead, the "critical inquiry" is whether the communication with the person assisting the lawyer was made in confidence and for the purpose of obtaining legal advice. Allied Irish Banks, P.L.C. v. Bank of Am., N.A., 252 F.R.D. at 168 (citing Spectrum Sys. Int'l Corp. v. Chem. Bank, 78 N.Y.2d 371, 379, 575 N.Y.S.2d 809, 581 N.E.2d 1055 (1991)); Haugh v. Schroder Inv. Mgmt. N. Am. Inc., 2003 WL 21998674, at *3. See also In re Grand Jury Subpoenas Dated March 24, 2003 Directed to (A) Grand Jury Witness Firm & (B) Grand Jury Witness, 265 F. Supp. 2d at 325 (holding that communications with a PR Firm were protected by the attorney-client privilege where the public relations consulting firm was hired to assist counsel to create a climate in which prosecutors might feel freer not to indict the client). "The communication itself must be primarily or predominantly of a legal character." Allied Irish Banks v. Bank of Am., N.A., 240 F.R.D. at 103. Expansions should be "cautiously extended." Haugh v. Schroder Inv. Mgmt. N. Am. Inc., 2003 WL 21998674, at *3 (citing United States v. Weissman, 195 F.3d 96, 100 (2d Cir. 1999)). See also Allied Irish Banks v. Bank of Am., N.A., 240 F.R.D. at 103 (finding that the attorney client privilege is not waived if involvement of a third party is "nearly indispensable or serve some specialized purpose in facilitating the attorney-client communications"). If the advice sought is that of a non-legal professional rather than a lawyer, no privilege exists. Id. (citing United States v. Kovel, 296 F.2d 918, 922 (2d Cir. 1961)).

McNamee argues that communications with Householder and Hendricks are not protected by the attorney-client privilege, because such communications were not "necessary so that counsel could provide Clemens with legal advice." (Pl.'s Mem. at 10, 16 (citing Haugh v.

Schroder Inv. Mgmt. N. Am. Inc., 2003 WL 21998674, at *3)). In response, Clemens claims that Householder was an agent or employee of Rusty Hardin, and Householder's role "was limited to the confidential assistance of defense counsel." (Def.'s Mem. at 10-11). Defendant likens Randy Hendricks to "in-house counsel" for defendant Clemens, and claims that Hendricks was not acting as a sports agent to Clemens during the relevant time period. (Def.'s Mem. at 14-15).

However, for the vast majority of documents provided for in camera review, defendant has not shown that Householder or Hendricks performed anything other than standard public relations or agent services for Clemens, nor has he shown that his communications with either were necessary so that Rusty Hardin could provide Clemens with legal advice. Haugh v. Schroder Inv. Mgmt. N. Am. Inc., 2003 WL 21998674, at *3. Instead, the Court's in camera review revealed that the majority of the communications with both Householder and Hendricks facilitated the development of a public relations campaign and media strategy primarily aimed at protecting Clemens' public image and reputation in the face of allegations that he used performance-enhancing drugs.[11] This is decidedly different from the use of the public relations firm in In re Grand Jury Subpoenas, where the firm was hired by plaintiff's counsel with the specific aim of reducing public pressure on prosecutors and regulators to bring charges. 265 F. Supp. 2d at 323. The use of the PR firm was thus directly related to litigation strategy and consequently protected by attorney-client privilege. 265 F. Supp. 2d at 323, 331. No such showing has been made here.

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[11]For example, certain emails from Householder to Rusty Hardin suggest contacting reporters and columnists who might be sympathetic to Clemens. Similarly, a series of emails from Hendricks to Rusty Hardin, Householder and others discusses whether Clemens should agree to a televised interview with a specific reporter.

Furthermore, although some emails reviewed by the Court potentially discuss pending legal proceedings and the risks of litigation, only a small number of documents could even remotely be considered privileged and Clemens has failed to provide adequate background or context (in the privilege log or otherwise) to demonstrate to the Court that the questionable documents are worthy of protection. Given the lack of clarity in the privilege log and the emails themselves, it is impossible to determine the specific purpose of many of the documents,[12] and, for the vast majority of emails that potentially relate to litigation, most seem designed to manage the public's perception of Clemens as opposed to discussing legal strategy. Without more information as to the relationship of these communications to the development of litigation strategy, defendant has failed to fulfil his burden to show that these communications were made for the purpose of obtaining legal advice or because of litigation. Moreover, it was counsel's responsibility to identify the potentially privileged documents scattered throughout a large number of unprivileged documents, rather than to submit a blanket privilege claim over broad categories of communications, many of which are clearly not privileged. Defendant's failure to narrow the scope of his privilege claims is troubling to the Court.

Defendant's "conclusory descriptions" of the role played by Householder and Hendricks "fail to bring the [documents at issue] within the ambit of the attorney-client privilege." Haugh v. Schroder Inv. Mgmt. N. Am. Inc., 2003 WL 21998674, at *3. Accordingly, the Court finds that the communications with Householder and Hendricks not protected by the attorney-client privilege.

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[12]For example, an email from Andy Drumheller to Randy Hendricks and others, dated September 28, 2010, contains a draft memorandum summarizing a conversation with an attorney regarding the federal investigation of performance enhancing drugs in Major League Baseball.

2. Work Product Protection

Defendant also claims that the work product protection applies to communications with Householder and Hendricks. "While state law governs the question of attorney-client privilege in a diversity action, federal law governs the applicability of the work product doctrine." Egiazaryan v. Zalmayev, 2013 WL 945462, at *11; Danza v. Costco Wholesale Corp., No. 11 CV 4306, 2012 WL 832289, at *1 (E.D.N.Y. Mar. 12, 2012); Allied Irish Banks, P.L.C. v. Bank of Am., N.A., 252 F.R.D. at 173 (citing Weber v. Paduano, No. 02 CV 3392, 2003 WL 161340, at *3 (S.D.N.Y. Jan. 22, 2003)). Rule 26(b)(3) of the Federal Rules of Civil Procedure provides the general rule that material prepared by or at the request of an attorney in anticipation of litigation is not subject to discovery. See Fed. R. Civ. P. 26(b)(3); In re Grand Jury Subpoenas Dated Mar. 19, 2002 & Aug. 2, 2002, 318 F.3d 379, 383 (2d Cir. 2002); A Michael's Piano, Inc. v. Fed. Trade Comm'n, 18 F.3d 138, 146 (2d Cir.) (quoting Hickman v. Taylor, 328 U.S. 495, 510-11 (1947)), cert. denied, 513 U.S. 1015 (1994).

To invoke the work product doctrine, the party withholding discovery must show that the withheld material is: 1) a document or tangible thing; 2) that was prepared in anticipation of litigation; and 3) was prepared by or for a party, or by his representative. Allied Irish Banks, P.L.C. v. Bank of Am., N.A., 252 F.R.D. at 173 (holding that the work product protection was inapplicable because the withholding party had not shown that it "actually anticipated litigation" at the time of the creation of the documents); OneBeacon Ins. Co. v. Forman Int'l, Ltd., 2006 WL 3771010, at *4 (finding that to invoke the work product protection, "a party must show that the documents were prepared principally or exclusively to assist in anticipated or ongoing

litigation"). The protection is not available for documents "that would have been created in essentially the same form irrespective of litigation." Allied Irish Banks, P.L.C. v. Bank of Am., N.A., 252 F.R.D. at 173 (citing United States v. Adlman, 134 F.3d 1194 (2d Cir. 1998) (noting that the withholding party had not shown that the documents at issue were prepared "*because of* the prospect of [] litigation") (emphasis in the original).

McNamee argues that the work-product protection is inapplicable to communications with both Householder and Hendricks, because the documents at issue were not prepared "because of" anticipated litigation or at the behest of counsel. (Reply[13] at 4, 8 (citing United States v. Adlman, 134 F.3d at 1203); Pl.'s Mem. at 11, 17-18 (citing In re Grand Jury Subpoenas Dated Mar. 19, 2002 & Aug. 2, 2002, 318 F.3d at 383)). In response, Clemens claims that communications with Householder and Hendricks are "worthy of protection" "for the same reason" – namely, that they were retained "to offer guidance and advice in anticipation of filing and defending lawsuits and Congressional inquiries." (Def.'s Mem. at 12, 15).

Defendant has failed to show that the work-product doctrine protects the documents at issue here. Based on the Court's in camera review of the records, the topic of litigation strategy is rarely mentioned and in the rare instances when it is brought up, it is often contained within communications predominately focused on public relations and media strategy. Although the communications sought may have ultimately "played an important role" in Rusty Hardin's litigation strategy, "as a general matter public relations advice, even if it bears on anticipated litigation, falls outside the ambit of protection of the so-called 'work product' doctrine. . . . That

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[13]Citations to "Reply" refer to Plaintiff's Reply Memorandum of Law in Further Support of Motion to Compel Discovery, dated August 14, 2013.

is because the purpose of the rule is to provide a zone of privacy for strategizing about the conduct of litigation itself, not for strategizing about the effects of the litigation on the client's customers, the media, or on the public generally." Calvin Klein Trademark Trust v. Wachner, 198 F.R.D. at 55 (citing United States v. Adlman, 68 F.3d at 1501); Egiazaryan v. Zalmayev, 290 F.R.D. 421, at *12. The Court's review of the withheld documents reveal that they deal almost exclusively with the latter.[14]

Accordingly, the work product doctrine is inapplicable to most of the documents at issue. Therefore, having reviewed the 900 plus pages of documents in camera and considered the parties' arguments, the Court grants plaintiff's motion to compel production.

C. Financial Documents

Plaintiff seeks financial information regarding Clemens' net worth, claiming that this information is relevant to plaintiff's claim for punitive damages. (Pl.'s Mem. at 7, 18 (citing Vasbinder v. Scott, 976 F.2d 118, 121 (2d Cir. 1992))). Although defendant Clemens "reserves his right to object to the breadth of this request and the relevance of requested materials," at this time, the parties' only dispute is whether the discovery plaintiff seeks is premature in light of defendant's intention to file a motion for summary judgment motion upon the close of discovery. (Def.'s Mem. at 17).

"Courts in this circuit are split on the issue of allowing pretrial disclosure of financial

[14]For example, in an email from Hendricks to Rusty Hardin and others, Hendricks discusses the possibility of future litigation as a means of preserving Clemens' public image in the face of negative publicity. Similarly, in an email from Householder to Rusty Hardin, Hendricks, others, Householder proposes a time line for filing suit, publicizing the suit, and thereby driving public viewers to an evening talk show featuring Clemens.

information relevant to a determination of punitive damages. Some permit it. Others have found that such disclosure is premature." Pasternak v. Dow Kim, 275 F.R.D. 461, 463 (S.D.N.Y. 2011) (quoting Copantitla v. Fiskardo Estiatorio, Inc., 09 CV 1608, 2010 WL 1327921, at *16 (S.D.N.Y. Apr. 5, 2010)); see also Hazeldine v. Beverage Media, Ltd., No. 94 CV 3466, 1997 WL 362229, at *2 (S.D.N.Y. June 27, 1997) (noting that the case law on the timing and scope of financial discovery relative to a punitive damages claim is "somewhat conflicting").

Several courts have found that "pre-trial financial discovery and a bifurcated trial is the more efficient method of managing a trial involving a punitive damages claim." Hazeldine v. Beverage Media, Ltd., No. 94 CV 3466, 1997 WL 362229, at *3; Open Housing Center Inc. v. Kings Highway Realty, No. 93 CV 766, 1993 U.S. Dist. LEXIS 15927, at *8 (Nov. 8, 1993 E.D.N.Y.) (allowing pre-trial discovery of financial information in an expedited trial); Tillery v. Lynn, 607 F. Supp. 399, 402 (S.D.N.Y. 1985) (allowing discovery of financial information before a bifurcated trial, but after denial of a motion for summary judgment). More recent cases, however, have found that pre-trial discovery of financial information is premature where the documents sought are "highly sensitive and confidential" and where "the need for disclosure may be abrogated by motion." See Pasternak v. Dow Kim, 275 F.R.D. at 463; Copantitla v. Fiskardo Estiatorio, Inc. 2010 WL 1327921, at *16 (declining to order production of financial information where it was "conceivable" that a summary judgment motion would "abrogat[e] the need for disclosure" of "highly confidential information").

The financial information sought here is clearly sensitive and confidential, and Clemens has indicated that he intends to file a motion for summary judgment which may negate the need for disclosure. Under the circumstances of this case, the Court finds Pasternak and Copantitla

persuasive, and finds that discovery of financial information regarding Clemens' net worth is premature. Accordingly, plaintiff's motion to compel discovery of documents relating to defendant's net worth is denied at this time, with leave to re-file after defendant's motion for summary judgment is decided.

D. Whether all documents have been produced

On August 19, 2013, defendant submitted a letter along with the documents provided for in camera review. Defendant's letter indicates that "some, but not all" confidential communications with Randy Hendricks have been produced to the Court. (Def.'s Let.[15] at 1). Defendant claims that a search of Rusty Hardin's email server is being performed, and that, if the Court finds it necessary, defendant will require additional time to produce all of the potentially responsive emails. (Id. at 2). In response, plaintiff complains that not all potentially responsive documents have been produced and argues that Randy Hendrick's email server should also be searched for responsive documents. (Pl.'s Let.[16] at 1). Plaintiff also expresses concern that defendant has only produced communications that he had "directly" with Public Strategies, rather than "all communications with Public Strategies regardless of whether Public Strategies was in the 'to,' 'from,' or 'CC' fields." (Id. at 2).

Defendant is directed to clarify whether he has produced all potentially responsive documents to the plaintiff. If there are any others, defendant is to explain what they are and why

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[15]Citations to "Def.'s Let." refer to defendant's letter accompanying documents submitted for in camera review, dated August 19, 2013.

[16]Citations to "Pl.'s Let." refer to plaintiff's letter to the Court, dated August 20, 2013.

they should not also be produced based on this Order's findings.

CONCLUSION

For the reasons stated herein, defendant is directed to produce all documents responsive to plaintiff's Document Requests 55 and 57 by **September 30, 2013.** Financial documents responsive to Request 62 need not be produced at this time, but plaintiff may renew his motion to compel such documents after defendant's proposed motion for summary judgment is resolved.

Furthermore, defendant Clemens has waived his claims of attorney privilege and work product protection for all documents contained in the Hendricks and Householder in camera files by failing to produce an adequate privilege log and accordingly defendant must provide both files to plaintiff McNamee.

SO ORDERED.
Dated: Brooklyn, New York
September 17, 2013

/s/ CHERYL POLLAK
Cheryl L. Pollak
United States Magistrate Judge
Eastern District of New York