

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHER DISTRICT OF ILLINOIS
EASTERN DIVISION

KLEEN PRODUCTS LLC, *et al.*,
individually and on behalf of
all those similarly situated,

Plaintiffs,

v.

INTERNATIONAL PAPER, *et al.*,

Defendants.

Case No. 10 C 5711

Judge Harry D. Leinenweber

DISCOVERY ORDER

The Court has reviewed Defendant RockTenn CP, LLC's (hereinafter, "RockTenn") *in camera* submissions for each of the nine categories of privilege log deficiencies alleged by the Plaintiffs. Based upon those submissions, the Court would like to make a few observations.

First, the number of documents included in the *in camera* sampling that do not appear to be privileged is troubling. The Court recognizes that drawing a distinction between business and legal advice is not always easy, particularly in the antitrust context, but it really is difficult to see how there could be any plausible claim of privilege with regard to many of the documents that have been submitted. To cite but one example, an e-mail from Craig Hunt, RockTenn's General Counsel, to Matt Denton, a fellow RockTenn employee, summarizes a

meeting with Steve Klinger, RockTenn's Chief Executive Officer, as follows:

Three hours of fun . . . Klinger called me on his way to the airport and told me he thought it went well. He only had to make one checkmark on his paper (per his coaching, he is now tracking the number of times he acts like a dick in a meeting (his words) . . . but just like down at the YMCA, he gets to call his own fouls). He also made one checkmark for [John] Knudsen[, a Senior Vice President at RockTenn,] (he does not get to call his own fouls). I will put together a to do list for us to go through [when] you get back.

Priv. Log. ID #665 (parentheticals in original).

Although the above e-mail perhaps may be of limited relevance to the overall case, it clearly contains no privileged legal advice. The Court has no intention of identifying every similar instance for which privilege has been asserted improperly over non-legal communications, but it suffices to say that the *in camera* selections include numerous allegedly privileged e-mails that contain nothing more than mundane chatter about routine business matters at RockTenn. These types of communications should not have been included on a privilege log.

Second, the Court notes that the mere fact that Mr. Hunt may have been copied on a given communication does not automatically transform the contents of that message into a privileged request for legal advice. *RBS Citizens, N.A. v.*

Husain, 291 F.R.D. 209, 216 (N.D. Ill. 2013). It is significant that, in addition to his role as General Counsel, Mr. Hunt also served as RockTenn's Chief Administrative Officer and Senior Vice President and Secretary. "When in-house counsel occupies both a legal and operational role, the test for determining if a document is privileged is 'whether the predominant purpose of the communication [was] to render or solicit legal advice.'" *Swift Spindrift, Ltd. v. Alvada Ins., Co.*, No. 09 Civ. 9342 (AJN) (FM), 2013 WL 3815970, at *8 (S.D.N.Y. July 24, 2013) (brackets in original, quoting *In re County of Erie*, 473 F.3d 413, 420 (2d Cir. 2007)). In other words, privilege will not apply where the legal advice provided is "incidental" to business advice. *Allendale Mut. Ins. Co. v. Bull Data Sys., Inc.*, 152 F.R.D. 132, 137 (N.D. Ill. 1993). Further, courts in this District have held that "[w]here a document is prepared for simultaneous review by legal and non-legal personnel and legal and business advice is requested, it is not primarily legal in nature and is therefore not privileged." *RBS Citizens*, 291 F.R.D. at 216 (quotation omitted).

Mr. Hunt appears to have been copied almost as a matter of course on most business matters concerning upper management at RockTenn. However, many of the exemplar documents that were

provided to the Court plainly contain no legal advice at all. For instance, in a June 3, 2010 e-mail addressed to Messrs. Klinger and Hunt, Mr. Knudsen asked whether RockTenn "should explore the concept of buying or partnering (AB) on a venture to convert a newsprint machine to KL/ME[.]" Priv. Log. ID #92 (parenthetical in original). Mr. Hunt responded with what could be characterized only as a business opinion: "It might make sense to talk to them, as I would doubt they have fleshed out a marketing plan for their containerboard tonnage. The increased risk profile . . . would have to be fully offset and then some by a superior return from the board's perspective." *Id.*

Similarly, it would be a stretch to describe as a request for "legal review" a June 24, 2010 e-mail addressed to Mr. Klinger, copying Mr. Hunt and several others, stating only that "[a]ttached is the latest version of the [bankruptcy] emergence [presentation to potential investors], reflecting all comments & changes to date." Priv. Log ID #1104. There is no indication that Mr. Hunt ever even responded to this message and, in any event, the attached PowerPoint slides clearly contain no legal advice. "Attachments which do not, by their content, fall within the realm of the [attorney-client] privilege cannot become privileged by merely attaching them to

a communication with the attorney." *Sneider v. Kimberly-Clark Corp.*, 91 F.R.D. 1, 4 (N.D. Ill. 1980). Moreover, since the attached presentation obviously was intended to be shown to third-parties, any applicable privilege would have been waived. *Appleton Papers, Inc. v. E.P.A.*, 702 F.3d 1018, 1025 (7th Cir. 2012).

Finally, a November 26, 2008 e-mail chain which is described on RockTenn's privilege log as a "request for legal advice re[garding an] asset purchase offer," contains nothing more than a business discussion about whether or not to allow a potential buyer to visit one of RockTenn's paper mills. Priv. Log ID #2204. Although Mr. Hunt is copied on three out of the four e-mails contained within the chain, he offered no legal advice in response.

The submissions provided for *in camera* review contain many more instances in which RockTenn has asserted the attorney-client privilege wrongly. In these circumstances, the Court finds that there is no alternative but to require that a new privilege log be compiled and produced in order to eliminate entries for e-mails or other communications where, although Mr. Hunt was copied, no legal advice actually was rendered.

Third, the Court agrees with the Plaintiffs that RockTenn's productions contain improper redactions. For

example, in an August 27, 2008 e-mail from Bob Boschee to Sonny Jackson regarding a visit to one of RockTenn's mills in Snowflake, Arizona, RockTenn redacted the following:

While at the mill, I was requested to provide the opportunity for a few local politicians and State business retention representatives to meet with me and discuss their concerns with the machine shutdown. After discussing with you and reviewing the request with Dean Jones, Mike Mullin, and Tom Lange, I agreed to do so. The discussion lasted about ½ hour and covered the expected questions regarding what these folks could do to affect the costs and save the mill jobs. The Snowflake mill HR Manager and Controller also sat in on the meeting and answered some questions. No media were involved.

Priv. Log ID #2939.

The Court fails to see what possible basis RockTenn would have for redacting this information. Although the passage may allude to a conversation with one of RockTenn's lawyers (Mr. Jones), it contains no legal advice and therefore is not privileged. Likewise, there was no valid reason for redacting Mr. Jackson's statement in a follow-up e-mail that "[this] is the initial report from Bob's and Hollis's visit to the Snowflake mill. Additional information will be forthcoming in the next several weeks."

As a general matter, there is nothing improper about redacting attorney-client privileged material from a larger disclosure; the problem is that RockTenn appears to have

adopted an overly capacious view of what constitutes privileged information. For that reason, it is worth emphasizing here that the mere existence of an attorney-client relationship "does not create a cloak of protection which is draped around all occurrences and conversations which have any bearing, direct or indirect, upon [that] relationship." *Matter of Walsh*, 623 F.2d 489, 494 (7th Cir. 1980) (internal quotation marks and parentheticals omitted). Rather, as the Supreme Court has explained, the attorney-client 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). "If the privilege attaches only to a portion of a document, [then] the document s[hould] be produced with [only] the privileged portion redacted." *Muro v. Target Corp.*, No. 04 C 6267, 2006 WL 3422181, at *6 (N.D. Ill. Nov. 28, 2006).

The Court has neither the desire nor the resources to micromanage discovery in a case of this size. However, to provide additional guidance to RockTenn in its task of revising its privilege log, the Court will make the following rulings with respect to the specific *in camera* selections that were submitted for review.

Business Communications

- # 49: Not privileged. This is business advice.
- # 141: Not privileged. Although "[c]ounsel's comments on, and revisions to, drafts of documents that are intended for ultimate disclosure to third parties can be privileged to the extent that the comments and revisions communicate legal advice and have been maintained confidential," *Acosta v. Target Corp.*, 281 F.R.D. 314, 321 (N.D. Ill. 2012), Mr. Hunt's edits to this industry presentation do not contain any discernable legal advice.
- # 665: Not privileged for the reasons explained above.
- # 704: Privileged. The Court finds that the redacted portion of this e-mail plausibly solicits legal advice.
- # 727: Not privileged. Although this document states that it is "attorney-client privileged," the Court finds no legal advice within the content of the e-mail or its attachment.
- # 779: Not privileged. The redacted portion states that the author would "appreciate feedback," but there is no indication whether the feedback solicited is legal or business advice. In the Court's view, the e-mail is not a request for legal advice.
- # 935: Not privileged. Although this e-mail copies Mr. Hunt, there is no indication that it is a request for legal advice. It simply contains a statement reflecting Mr. Klinger's views about the right for management to present recommendations to the board in a plan to be submitted to the bankruptcy court.
- # 1881: Partially privileged. RockTenn may redact Mr. Hunt's comments, but Mr. Klinger's and Chuck Hinrich's remarks indicating that they have not spoken to Mark Wilde, a Deutsche Bank Equity analyst, are not privileged.

2105: Privileged.

2575: Privileged.

Communications Routed Through an Attorney

481: Not privileged. There is no indication that this e-mail was sent for legal review, nor is there anything to suggest that Mr. Hunt was responsible for any of the changes made to the attached "Investor Q & A." Although he is copied on the message, it does not appear that Mr. Hunt ever responded to this communication.

975: Not privileged. This communication summarizes purely business matters. The fact that RockTenn (then Smurfit-Stone Container Company ("SSCC")) was going through bankruptcy proceedings at or near this time does not make every business discussion Mr. Klinger had with Mr. Hunt attorney-client privileged.

1090: Not privileged. Despite RockTenn's characterization of this e-mail, there is no indication that the author was requesting legal review. It is improper to infer as a blanket matter that any e-mail asking for "comments" that copies in-house counsel along with several other high level managers automatically is a request for "legal review." See, *Acosta*, 281 F.R.D. at 321 ("the privilege does not apply to an e-mail 'blast' to a group of employees that may include an attorney[] but where no request for legal advice is made and the input from the attorney is business-related and not primarily legal in nature"). That is especially so where, as here, in-house counsel occupies an operational, as well as a legal, role.

1096: Not privileged for the reasons just stated.

1104: Not privileged for the reasons just stated.

1116: Privileged. As opposed to investor presentations, Form 10-Q drafts are primarily legal in nature. Therefore, it is plausible

that this e-mail together with its attached contents were sent as part of a request for legal review.

- # 1152: Acceptable as redacted.
- # 1221: Privileged.
- # 1263: Privileged.
- # 2024: Not privileged. The document contains no legal advice.

General or Vague Description

- # 88: Privileged.
- # 92: Not privileged. Mr. Hunt offers only business, rather than legal, advice.
- # 736: Not privileged. The redacted portion does not contain legal advice.
- # 741: Not privileged for reasons already discussed.
- # 2310: Privileged.
- # 2355: Privileged.
- # 2361: Privileged.
- # 2518: Acceptable as redacted.
- # 3397: Not privileged. There is no basis for redacting the portion of this e-mail stating that the attached information would be shared with attorneys at Sidley Austin. The fact of representation itself is innocuous and is not subject to the protections of the attorney-client privilege. See, e.g., *Condon v. Petacque*, 90 F.R.D. 53, 54 (N.D. Ill. 1981); *Savoy v. Richard A. Carrier Trucking*, 178 F.R.D. 346, 350 (D. Mass. 1998).
- # 3399: Privileged.

Failure to Identify Attorneys

- # 1288: Privileged. Although the document does not state its author, it is reasonable to infer from its contents that it was written by one of RockTenn's lawyers. Moreover, the document clearly contains legal advice.
- # 2235: Privileged for the reasons just stated.
- # 2278: Privileged for the reasons just stated.
- # 2741: Privileged for the reasons just stated.
- # 3261: Privileged for the reasons just stated.
- # 3382: Partially privileged. This e-mail chain contains predominately business advice and must be produced. However, the attachment may be produced as redacted.
- # 3482: Not privileged. There is no indication as to who authored this document. Although it does concern antitrust issues, it could have been written by anyone within RockTenn's management. As the proponent of the privilege, RockTenn bears the burden of establishing that the document at issue is indeed attorney-client material. *Cornejo v. Mercy Hosp. and Med. Ctr.*, No. 12 C 1675, 2014 WL 4817806, at *3 (N.D. Ill. Sept. 15, 2014). RockTenn has not made that showing with regard to this particular document. Consequently, it must be produced.

Failure to Identify Authors and/or Recipients

- # 2434: Acceptable as redacted.
- # 2745: Not privileged. There is no indication as to who authored this document and its contents appear to be related solely to business matters.
- # 2785: Privileged. This is a classic internal legal memorandum.
- # 3006: Privileged. See, *Acosta*, 281 F.R.D. at 321.

3081: Privileged. *See, id.*

3228: Privileged. *See, id.*

Third-Party Communications

285: Not privileged. This document contains no substantive information at all, let alone privileged information.

204: Privileged. This is a communication between counsel, senior SSCC executives, and The Levin Group, L.P. ("Levin"), a third-party strategic and financial advisory firm that was retained by SSCC for assistance during prior bankruptcy proceedings. Since Levin was employed for purposes of assisting counsel with bankruptcy matters and the e-mail correspondence at issue appears to relate to the development of a model for SSCC's plan of reorganization, the Court finds that these communications are privileged. *See, In re Grand Jury Subpoena Dated March 20, 2013*, No. 13-Mc-189 (Part I), 2014 WL 2998527, at *8 (S.D.N.Y. July 2, 2014) (communications among a client, counsel, and a third-party consultant are privileged if communication with the consultant "is necessary, or at least highly useful, for the effective consultation between the client and the lawyer").

220: Privileged for the reasons just stated.

803: Privileged for the reasons just stated.

E-mail Attachments

291: Not privileged. Neither the e-mail nor the attachment contain legal advice.

295: Acceptable as produced. The remainder that has not been produced contains attorney-client material.

326: Not privileged. Although this e-mail copies Mr. Hunt, it cannot be construed as a request for

legal review and, in any event, Mr. Hunt did not respond.

- # 634: Acceptable as produced.
- # 849: Not privileged. This document is not a request for legal advice.
- # 856: Acceptable as produced.
- # 863: Not privileged. This e-mail contains no indicia that it was sent for legal review. Nor does the attached "Earnings Update" for the 2nd Quarter of 2010 reflect any legal advice.
- # 864: Not privileged for the reason just stated.
- # 1126: Not privileged for the reason just stated.
- # 1184: Not privileged. There is no indication that the attached draft presentation was circulated for legal review.

Non-Responsive Redactions

- # 2860: The redacted portions of this internal PowerPoint presentation relate to pricing and other financial information concerning a foreign division of a company called Global Packaging Solutions, which operated in Asia and served the Asian market. Although RockTenn redacted this information as "non-responsive," it would appear that the slides are responsive insofar as they relate to the Plaintiffs' initial documents served in May 2011, which sought information relating to RockTenn's Asian exports and the pricing of containerboard in China. In the Court's view, the redacted information is relevant and, therefore, was withheld improperly. The presentation should be produced in its entirety.
- # 2881: The redacted portions of this presentation must be produced for the reasons just stated.

- # 2970: The redacted portion of this presentation appears to contain a legal overview of RockTenn's "restructuring activities." This information is privileged and RockTenn is entitled to redact it.
- # 2972: The redacted portions of this presentation that concern RockTenn's bankruptcy do not appear to contain any legal information and therefore are not privileged. The remaining portions of the presentation that were withheld relate to the containerboard market in Asia. For reasons stated previously, such information is responsive and must be produced.
- # 2988: The redacted portions of this presentation must be produced for the reasons just stated.
- # 2993: The redacted portion of this presentation is the same legal overview that was redacted in Priv. Log ID #2970. The information is privileged and may be redacted.
- # 2994: The redacted portion of this presentation is the same legal overview that was redacted in Priv. Log ID #2970. The information is privileged and may be redacted.
- # 2996: The redacted portion of this presentation relating to pricing and financial results in the Asian markets must be produced for reasons explained previously. In addition, RockTenn also seeks to withhold a portion of a slide containing information relating to certain intellectual property matters. There is no indication that a lawyer authored this portion of the presentation, however, and, in any event, having reviewed the material, the Court finds that this information contains no discernable legal advice. Consequently, any redaction made on privilege grounds was improper. The material must be produced.
- # 2997: The redacted portion of this presentation relating to pricing and results in the Asian markets must be produced for reasons stated

previously. However, the Court will permit RockTenn to redact the slides relating to legal advice concerning labor union issues as well as the four-slide portion of the presentation containing legal advice that was prepared by RockTenn's legal department in advance of a "senior leadership meeting."

3218: The redacted portions of this presentation must be produced for the reasons stated with regard to Priv. Log ID #2996.

Over-Redaction

1049: The redacted portions are not privileged. The Court fails to see how the redacted parts of this e-mail chain reveal any confidential legal information. All that is discussed is whether or not to include certain information in a business presentation.

1102: Acceptable as produced.

1777: Not privileged. Contrary to RockTenn's description, the redacted portions of this e-mail chain do not contain any apparent request for legal advice and no lawyers appear to have responded to any of the messages. The redaction therefore was improper.

1941: Acceptable as produced.

2064: Acceptable as produced.

2019: Not privileged. The redacted portions contain no legal advice.

2039: Not privileged for reasons explained on page 4 of this Order.

2170: Not privileged. The redacted portions of this e-mail chain are routine scheduling matters, the disclosure of which would not compromise any confidential legal matters.

2321: Acceptable as produced.

3132: Acceptable as produced.

CONCLUSION

For the reasons stated herein, the Plaintiffs' Motion to Compel RockTenn to amend its privilege log and produce certain documents [ECF Nos. 546, 550] is granted in part and denied in part. RockTenn is directed to conduct a supplemental privilege review consistent with this Order and serve a revised privilege log by December 10, 2014. Any documents that are not privileged shall be produced by that date.

IT IS SO ORDERED.



Harry D. Leinenweber, Judge
United States District Court

Dated:11/12/2014