UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

United States of America, ex rel., et al.,

Plaintiffs,

v.

Cameron-Ehlen Group, Inc., et al.,

Defendants.

Case No. 13-cv-3003 (WMW/DTS)

ORDER

INTRODUCTION

In this False Claims Act matter the Government alleges Defendants violated the Anti-Kickback Statute by inducing physicians, through expensive trips and other emoluments, to purchase Defendants' intraocular lens products. The precise issue now before this Court is whether, when, and to whom the common-interest privilege applies in communications between the Relator and an FBI agent prior to the statutorily required disclosure was made to the government.

Several key dates affect the analysis. On or about April 25, 2013, Relator told an FBI agent investigating Defendants that he had hired a lawyer to draft a False Claims Act complaint. Five months later, on or around September 24, 2013, the Relator transmitted a copy of his proposed qui tam complaint to the Government as required by 31 U.S.C. § 3730(b)(2). On November 1, 2013, the Relator filed this action under seal, as also required by 31 U.S.C. § 3730(b)(2). On August 14, 2017, after eleven continuances, the Government filed its notice to intervene in the action. The parties appear to agree that the common-interest privilege applies from the date of the initial disclosure on September 24, 2013, to the present, but disagree whether it begins to apply at an earlier point in time,

when the Relator first informed the FBI agent he had retained an attorney to prepare the qui tam complaint. The answer to that question—at least on the current record—is both elusive and unclear as the Court has sparse factual detail with which to fully analyze the circumstances.

ANALYSIS

I. The Common Interest Doctrine

The phrase "common-interest privilege" is a bit of a misnomer as there is no independent privilege created by the application of the doctrine.[1] Rather, the common-interest doctrine creates an exception to waiver by disclosure of otherwise privileged material—either attorney-client communication or work product—that would occur when the privileged material is communicated between parties whose interests are appropriately aligned in litigation or anticipated litigation. *In re Grand Jury Subpoena Duces Tecum*, 112 F.3d 910, 922 (8th Cir. 1997); Restatement (Third) of the Law Governing Lawyers § 76 (2000). Thus, the doctrine itself does not make privileged a communication that is not otherwise privileged; it merely prevents the privilege from being waived when the material is communicated to third parties in certain appropriate and defined circumstances. The theory underlying the common-interest doctrine is that the interests of the two parties between whom the communication flows are so completely aligned that the communication ought to remain privileged. *Cf.* Restatement § 76 cmt. b; *United States v. BDO Seidman, LLP*, 492 F.3d 806, 816 (7th Cir. 2007). The parties have

[1] Depending upon the procedural alignment of the parties, courts often refer to the concept embodied by the common-interest doctrine as the "joint defense" or "joint prosecution" privilege. This Court will use the phrase "common-interest privilege" to encompass both joint defense and joint prosecution agreements.

such a unity of interest and purpose that it is functionally as if one party were talking to itself. But, communications between these two parties that are not otherwise privileged do not become so merely because the parties share a common interest. *BDO Seidman*, 492 F.3d at 815-16.

In False Claims Act cases in which the government has intervened, communication of attorney-client material and work product between the relator and the government remain privileged because the relator and the government have a unified interest in the prosecution of the matter. On this point, the caselaw is clear. *See, e.g.*, *United States ex rel. Purcell v. MWI Corp.*, 209 F.R.D. 21, 27 (D.D.C. 2002); *United States ex rel. (Redacted) v. (Redacted)*, 209 F.R.D. 475, 479 (D. Utah 2001) (citing *United States v. Schimmels*, 127 F.3d 875, 882 (9th Cir. 1997). The caselaw is also clear that the compulsory disclosure required by 31 U.S.C. § 3730 is also subject to the common-interest doctrine. *E.g.*, *In re Uehling*, 2014 WL 1577459, at *5 (E.D. Cal. Apr. 17, 2014). But what is less clear in the caselaw is whether the common-interest doctrine applies at any point in time prior to the intervention decision. The Court has not found any definitive guidance or even any persuasive authority on this point.

Likewise, the Court has been unable to find any guidance on the question whether, once the government decides to intervene, the intervention somehow "relates back" to the initiation of communication between the parties because the parties later determined they had a unity of purpose. The opinions cited by both parties are not instructive on this point. The Plaintiffs rely on several decisions arising in cases when the Government had already intervened and the communications at issue seem to have occurred after that intervention. *See MWI Corp.*, 209 F.R.D. at 23-24, 26-27; *United States ex rel.*

(Redacted), 209 F.R.D. at 478-79. Similarly, the Defendants cite the case of *In re Grand Jury Subpoena*, 112 F.3d 910, which, though instructive on the general parameters of the common interest doctrine, does not shed light on the specific questions as they relate to a qui tam action.

II. Application of the Common Interest Doctrine to the Present Circumstance

With this understanding of the common interest doctrine in mind, the Court has very little factual detail before it on which to assess its application to the precise communications at issue. According to the parties, the following facts are established. On or around April 25, 2013, the Relator contacted an FBI agent who was currently involved in an investigation of the Defendants. The Relator informed the FBI agent that he had retained an attorney to file a qui tam action. At the time of this communication, however, the Assistant United States Attorneys who would later become involved in the case were unaware of this communication. Beyond these broad details, the Court has no specific factual information.

On this sparse record, the Court cannot say whether the Relator's statement to the FBI that he had retained a lawyer is sufficient indicia of a sufficient common interest to trigger application of the common-interest doctrine. On the one hand, if the Relator and his counsel had made a firm decision to initiate a False Claims Act matter and if the FBI agent had sufficient interest in that matter it is conceivable that the anticipation of the litigation and the requisite disclosure could trigger such unity of interest that in fairness the common-interest doctrine should apply. If, on the other hand, the potential for a civil qui tam action were somehow inimical to the then-anticipated prosecution efforts of the Government, the parties' interests may well not have been so unified as to call for

application of the doctrine. *Cf. United States ex rel. (Redacted)*, 209 F.R.D. at 479 n. 3 (noting that the interests of the Government and a relator are not unified at every point of a qui tam action—such as determining the relator's share of a damages award). On this record, and in the absence of directly applicable precedent, though cognizant of the burden of proof, the Court is hesitant to find a waiver of otherwise privileged material. The parties are invited, but not ordered, to provide sufficient factual detail and legal argument necessary to resolve the broader question of whether the common interest doctrine is to be applied prior to September 2013.

That, however, does not end the inquiry. The precise issue before the Court is whether documents and communications contained on Relator's/Government's privilege log, which occurred between April 2013 and September 2013 are shielded from discovery under the common interest doctrine. As previously noted, however, the common interest doctrine only protects from disclosure materials that are themselves protected from by the attorney-client privilege or the attorney work-product doctrine. The Court has no information before it by which to judge whether the communications at issue on the privilege log are in fact otherwise privileged, irrespective of the applicability of the common interest doctrine during the relevant time period. *See Hollins v. Powell*, 773 F.2d 191, 196 (8th Cir. 1985) (stating that "the party who claims the benefit of the attorney-client privilege has the burden of establishing the right to invoke its protection"). Accordingly, the Court hereby ORDERS:

1. Relator shall produce in discovery, any and all communications between it and the FBI or other government officials that are not independently subject to the attorney-client privilege or the attorney work-product doctrine.

2. All such communications involving attorney work product or attorney-client privilege material that occurred on or after April 24, 2013, shall not be produced absent further order of this Court.

Dated: June 10, 2019

s/David T. Schultz
DAVID T. SCHULTZ
United States Magistrate Judge