UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

ANNETTE NAVARRO MCCALL, *et al.*,	:	
Plaintiffs,	:	**Civil Case No. 1:17-cv-406**
	:	**Judge Timothy S. Black**
v.	:	
	:	**Magistrate Judge Karen L. Litkovitz**
THE PROCTER & GAMBLE COMPANY, *et al.*,	:	
Defendants.	:	

DEFENDANT THE PROCTER & GAMBLE COMPANY'S MEMORANDUM IN OPPOSITION TO PLAINTIFF ANNETTE NAVARRO MCCALL AND NAVARRO PHOTOGRAPHY LLC'S MOTION TO COMPEL DEFENDANT THE PROCTER & GAMBLE COMPANY TO PRODUCE DOCUMENTS BEING WITHHELD BASED UPON AN IMPROPER CLAIM OF PRIVILEGE

Defendant The Procter & Gamble Company ("P&G") hereby submits this memorandum in opposition to Plaintiffs Annette Navarro McCall ("Ms. Navarro") and Navarro Photography LLC's ("NPLLC") (collectively "Plaintiffs") motion to compel the production of privileged documents (the "Motion to Compel"). Not only is Plaintiffs' Motion to Compel ill-timed due to the recent filing of the Second Amended Complaint (ECF No. 48) and Plaintiffs recently served Third Set of Requests for the Production of Documents, both of which will extend the discovery period, but Plaintiffs' Motion to Compel also misrepresents P&G's efforts to cooperate with Plaintiffs' already excessive and unnecessary discovery demands. Plaintiffs' attempts to smear P&G's name and paint it as a "dismissive and contemptuous" bully are unsupported by the correspondence between the parties and the relevant case law. As such, Plaintiffs' Motion to Compel should be denied. The declaration and exhibits in support of this Memorandum will be presented to the Court for an in-camera inspection. A brief in support follows.

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SUMMARY OF ARGUMENT

Plaintiffs' Motion to Compel is unfounded on several grounds:

1. P&G's privilege log was timely produced.
2. The final version of the privilege log contains all information required by Federal and Local Rules of Civil Procedure and allows Plaintiffs to adequately assess the claim of privilege for each document.
3. The documents and communications identified on the privilege log all contain legal advice or attorney work product that is subject to the privilege protections afforded by the Civil Rules.

P&G has made twenty-four document productions and has revised its original privilege log twice in response to Plaintiffs' objections. P&G also revisited the documents designated as privileged during its initial document collection and removed the privilege designation from over 100 documents. Those documents have already been produced to Plaintiffs. Despite P&G's efforts, Plaintiffs filed this Motion to Compel.

The final version of P&G's privilege log, distributed on August 20, 2018, complies with Federal and Local Rules of Civil Procedure. The log discloses the necessary information as required by the Rules and the courts in this Circuit, including a description of the document, the date of the document, the involved individuals, and the attorney triggering the privilege. Additionally, the log was timely disclosed. The timeliness of producing a privilege log is to be evaluated on a case-by-case basis by evaluating the receiving party's ability to evaluate the privilege objections, the magnitude of the document production, and other circumstances surrounding the litigation that would impact the log's production.

These factors weigh in favor of P&G. Based on the information provided in the log, Plaintiffs can evaluate each of the withheld documents. The magnitude of P&G's document production in response to Plaintiffs ever-growing requests also impacted P&G's ability to produce a log earlier in this litigation. It was also P&G's understanding that both parties would

produce their respective logs once document productions were finalized. There is no evidence of bad faith on P&G's part, as it kept Plaintiffs informed of the progress of the privilege log while working through complex discovery issues. Indeed, P&G produced its privilege log **three times**.

In addition to being timely, the log itself comports with Federal and Local Rules and only includes documents that are privileged. P&G provided enough description of each document to show that the document contains or seeks legal advice regarding the copyright issues at hand. P&G cannot disclose more information without revealing the actual contents of the documents themselves or waiving privilege altogether. The documents are subject to attorney-client privilege as they represent communications between counsel and P&G employees that contain legal advice. All documents listed on the privilege log involve an attorney giving advice in his or her legal capacity, despite the location of the attorney's email address in the "to" or "cc" line, or the order of the legal advice within the email chain itself.

The number of individuals involved does not negate the privileged nature of the communications, as Plaintiffs would suggest. Nor does the presence of business advice strip a communication of its privileged nature when the primary purpose of the communication is to relay legal advice, as is the case with the documents in P&G's privilege log. The documents subject to the work product privilege were all created in anticipation of litigation surrounding the copyrights and products at issue. Finally, communications and documents involving third parties are subject to the common interest doctrine and were made in order to further the same interest.

Plaintiffs' Motion to Compel is not well founded and should be denied. Plaintiffs are not entitled to attorneys' fees as P&G has acted in good faith. However, if the Court were to find deficiencies with P&G's privilege log, that finding does not require waiver of privilege. Instead, the Court should allow P&G to amend the privilege log to cure any deficiencies.

BRIEF IN SUPPORT

I. FACTUAL AND PROCEDURAL BACKGROUND.

As this Court is well aware of the factual background of this litigation, P&G will not recite unnecessary facts here. P&G is obligated to point out, however, that Plaintiffs filed a Third Amended Complaint on September 28, 2018. Despite Plaintiffs' claims that P&G's production has been insufficient because it has not produced documents related to forty-six separate P&G products (Motion, p. 2), Plaintiffs cannot argue that those products were even remotely relevant until the filing of the Second Amended Complaint. Plaintiffs' arguments otherwise only demonstrate the outlandish discovery demands that Plaintiffs have insisted P&G meet, without any legal support for Plaintiffs' Motion to Compel. In addition, Plaintiffs' served their Third Set of Requests for the Production of Documents on October 5, 2018, adding on another sixty-six document requests, which will only force P&G to supplement its privilege log again, regardless of Plaintiffs' Motion to Compel.

Relevant to the timeliness of the Motion to Compel, P&G first produced its privilege log on July 18, 2018, five months after receiving Plaintiffs' first official discovery requests in February of 2018. However, during that five month period, the scope of Plaintiffs' discovery requests was continually expanding seeking new and additional information well-beyond what was originally requested. The ever-shifting target of what Plaintiffs deemed as "relevant" to their first discovery requests forced P&G to constantly revisit its document collection, adding ever more custodians and search terms, and thereby delaying the production of its privilege log.

While Plaintiffs may have provided the Court with a general timeline of the communications between the parties regarding the log, Plaintiffs have selectively omitted several communications and events initiated by Plaintiffs that impacted P&G's ability to produce a

complete privilege log. Below is a complete timeline of the parties' interactions regarding the parties' ongoing discovery and rolling document production, P&G's privilege log, and the surrounding circumstances that affected the timing of the log's production. The events in bold were not included in Plaintiffs' timeline of events:

- March 18, 2018: Plaintiffs emailed P&G to allege deficiencies in P&G's response to Plaintiffs' first set of requests to produce documents. In the email, Plaintiffs ask P&G when P&G anticipates producing its privilege log.

- March 21, 2018: P&G emailed Plaintiffs in response to email alleging deficiencies and states that the document production is ongoing.

- **March 23, 2018**: P&G's First Document Production.

- **April 11, 2018**: P&G's Second Document Production.

- **April 13, 2018**: P&G's Third Document Production.

- April 16, 2018: Plaintiffs emailed P&G inquiring as to the status of P&G's privilege in response to receiving P&G's third document production.

- April 17, 2018: P&G emailed Plaintiffs stating that the privilege log was underway but not yet completed.

- **April 17, 2018**: P&G's Fourth Document Production.

- **April 17, 2018**: Plaintiffs emailed P&G asking P&G to provide additional metadata for all document productions, a list of the custodian collections search and how P&G determined that the custodians were relevant, and information related to foreign sales that P&G had previously objected to producing.

- **April 20, 2018**: P&G's Fifth Document Production.

- April 23, 2018: P&G emailed Plaintiffs stating that P&G was still working on the privilege log.

- April 26, 2018: P&G emailed Plaintiffs regarding a number of discovery issues and states that the privilege log is not complete as document production is ongoing. P&G ask Plaintiffs if they would like an incomplete log, or if they would like P&G to produce after the document production is completed.

- **April 27, 2018**: P&G's Sixth Document Production.

- April 30, 2018: Plaintiffs sent a letter to P&G via email stating that it had not yet received a privilege log and asking P&G when it would be provided, without addressing P&G's question posed it the email sent on April 26, 2018.

- May 2, 2018: P&G's Seventh Document Production.

- **May 8, 2018**: Plaintiffs emailed P&G informally asking for information and clarification as to certain abbreviations and acronyms in documents provided in response to Plaintiffs' discovery requests.

- **May 11, 2018**: P&G's Eighth Document Production.

- **May 15, 2018**: Plaintiffs emailed P&G requesting a narrative that would connect the Alleged Infringing Products with the corresponding financial information P&G provided in response to Plaintiffs' prior discovery requests.

- **May 16, 2018**: P&G's Ninth Document Production.

- **May 18, 2018**: Plaintiffs emailed P&G asking for further clarification and information as to the financial information P&G previously provided in response to Plaintiffs' discovery requests.

- **May 23, 2018**: P&G's Tenth Document Production.

- **June 6, 2018**: P&G's Eleventh Document Production.

- **June 8, 2018**: P&G's Twelfth Document Production.

- **June 8, 2018**: Plaintiffs emailed P&G requesting that P&G's counsel update information contained in a chart that Plaintiffs' counsel created regarding the financial information provided by P&G in response to Plaintiffs' discovery requests.

- June 11, 2018: The parties participated in a telephone conference with Judge Black in which a variety of discovery issues were discussed.

- **June 12, 2018**: P&G's Thirteenth Document Production.

- **June 14, 2018**: P&G's Fourteenth Document Production.

- **June 15, 2018**: Plaintiffs email P&G regarding a number of follow-up requests for clarification as to the content in the financial documents provided in response to Plaintiffs' discovery requests.

- **June 22, 2018**: P&G's Fifteenth Document Production.

- June 23, 2018: P&G emailed Plaintiffs stating that it was P&G's understanding that the parties had mutually agreed that the parties' respective privilege logs would be provided after document productions were completed, noting that privilege logs would not be critical for the parties upcoming mediation and that Plaintiffs had also failed to produce a privilege log.

- June 25, 2018: Plaintiffs emailed P&G and expressly claim for the first time that Plaintiffs did not agree to wait until the end of the document production to produce privilege logs. The email also asserts conclusory allegations that one of P&G's in house counsel, Aftab Pureval, must have business related communications that need to be produced.

- **June 27, 2018**: P&G's Sixteenth Document Production.

- **June 28, 2018**: P&G's Seventeenth Document Production.

- **July 3, 2018**: Plaintiffs sent a letter to P&G regarding a number of topics, including information regarding acronyms, perceived inconsistencies in the financial documents, clarification as to differences between two products at issue, an explanation as to the breakdown of financial categories in Canada, and an explanation as to P&G's methods for certain cost categories listed in the financial documents.

- July 11, 2018: P&G sent a letter to Plaintiffs informing Plaintiffs that the privilege log cannot be produced while Plaintiffs continue to make additional document requests, as the log continuously needs to be supplemented. P&G informs Plaintiffs that the log will be finalized and produced once the document production is complete.

- July 17, 2018: Plaintiffs emailed P&G claiming that Plaintiffs have made no new document requests and threatening to file a motion to compel P&G's privilege log.

- **July 17, 2018**: P&G's Eighteenth Document Production.

- **July 18, 2018**: P&G's Nineteenth Document Production.

- July 18, 2018: P&G produced its first version of the privilege log. The log is sent with a cover email from Karen Gaunt to Plaintiffs' counsel with privilege log attached. The email explains that the log contains duplicate entries due to collections from multiple custodians and explains how the fields were populated based on the document's metadata.

- July 20, 2018: Plaintiffs sent a letter to P&G containing Plaintiffs' objections to P&G's first privilege log and requesting that P&G provide an updated log and the documents Plaintiffs claim were not privileged.

- **August 2, 2018**: Counsel for Plaintiffs and P&G participate in a conference call and discuss the second version of the privilege log. P&G confirmed in an email that the

privilege log was discussed during the call and that a new version would be produced on August 3, 2018.

- August 3, 2018: P&G produced its second version of the privilege log. Accompanying the privilege log is a letter responding to Plaintiffs' July 20, 2018 letter regarding the privilege log. The letter discusses the timing of the privilege log, the number of privileged documents (again explaining that not all entries are unique), updated descriptions, and highlighting the triggering attorney's involvement in the communication or document.

- **August 3, 2018**: Plaintiffs sent a letter to P&G stating that the privilege log produced on August 3, 2018, that same day, was insufficient and demanding that P&G supplement the log before August 10, 2018 with the threat of filing a motion to compel.

- **August 3, 2018**: P&G produced an Excel formatted version of the second version of the privilege log, which includes a column for the number of pages in each document.

- **August 6, 2018**: Plaintiffs emailed P&G regarding P&G's perceived duty to supplement the document production and interrogatory responses.

- **August 8, 2018**: Plaintiffs emailed P&G requesting further explanation as to the acronyms and line items from P&G financial reports that were provided in response to Plaintiffs' discovery requests.

- **August 10, 2018**: P&G's Twentieth Document Production.

- **August 13, 2018**: Plaintiffs emailed P&G requesting copies of coupons, ads, and other marketing materials involving products not named in the First Amended Complaint.

- **August 15, 2018**: Plaintiffs emailed P&G requesting a phone conference on pending motions and an update on P&G's privilege log, stating that Plaintiffs remain "hopeful" that a resolution can be reached.

- **August 17, 2018**: P&G's Twenty-First Document Production.

- **August 17, 2018**: P&G emailed Plaintiffs stating that, due to technology issues, P&G would not be able to produce its third version of the privilege log on that date.

- **August 18, 2018**: Plaintiffs' counsel responds to P&G's technology issues and thanks P&G's counsel for the update.

- August 20, 2018: P&G produced its third version of the privilege log. P&G sends a cover email with the third version of the privilege log explaining updates to the description of the documents, changes to the author and recipient entries, and the number of pages. The email confirms that all documents predating 2016, a year identified in Plaintiffs' August 3, 2018 letter, were reviewed to determine if they were created in anticipation of

litigation. The email also confirms that all documents were an attorney was carbon copied were reviewed, and that the log was produced in chronological order. Finally, the email states that the log will need to be supplemented as P&G continues to collect and review documents for production.

- **September 12, 2018**: Plaintiffs emailed P&G requesting UPC codes for all Alleged Infringing Products.
- **September 17, 2018**: P&G's Twenty-Second Document Production.
- **September 19, 2018**: P&G emailed Plaintiffs stating that the document production on September 17, 2018 included the documents removed from the privilege log that were deemed not privileged upon further review.
- **October 3, 2018**: P&G's Twenty-Third Document Production.
- **October 5, 2018**: P&G's Twenty-Fourth Document Production.
- **October 5, 2018**: Plaintiffs' served their Third Set of Requests for the Production of Documents upon P&G.

(Declaration of Andrew Barras, ¶¶5–62, attached as Ex. A.) As demonstrated by the communications from opposing counsel, Plaintiffs repeatedly asked P&G to expand the parameters of its discovery responses. Acting in good faith and in the spirit of cooperation, P&G did so, with the understanding that the changing parameters would affect the privilege log. (*Id.* ¶¶4, 42, Ex. 14) However, Plaintiffs continued to ask P&G for the privilege log, and, again, in the spirit of acting in good faith and contrary to its own understanding of the original agreement between the parties, P&G produced its first privilege log on July 18, 2018. (*Id.* ¶47, Ex. 19.) Subsequent distributions were made on August 3, 2018 and August 20, 2018, all in response to Plaintiffs' objections to the log. (*Id.* ¶¶ 50, 52, 59, Exs. 22, 24, 31) P&G made these subsequent distributions with every intent of addressing Plaintiffs' concerns. In fact, P&G distributed the August 3rd privilege log twice after counsel realized that a column containing page numbers had been erroneously omitted. (*Id.* ¶52, Ex. 24.) All these actions were taken in good faith that the parties were working together to agree on an acceptable format for P&G's privilege log.

The current version of the privilege log contains the following information:

- Document Count
- Control ID Number (imported from document review platform)
- Document Date
- Document Type
- Number of Pages
- Author(s)
- Recipient
- CC Recipient(s)
- BCC Recipient(s)
- Privilege Legal Claim (Attorney Client or Work Product)
- Triggering Attorney
- Description

(*See* Declaration of Robert Allen, attached to Plaintiffs' Motion to Compel, Ex. M2.)

Due to the length of the privilege log, some of these fields in the first version of the privilege log were created through an auto-populating process. (Barras Decl. ¶2.) In the case of electronic communications, the auto-populating process uses information pulled from the last chain of an email, although the privileged legal advice may appear earlier in the email chain. (*Id*.) Upon information and belief, P&G believes that several of Plaintiffs' objections stem from this process. After receiving Plaintiffs first set of objections to the privilege log, P&G's counsel reevaluated the log and concluded that some documents within the log were inadvertently marked as privileged. P&G completed another review upon receiving Plaintiffs' second set of objections to the second privilege log in a similar manner. P&G removed documents from the privilege log at those stages and produced them to Plaintiffs. (*Id.* ¶61, Ex. 33.) Documents that were determined to contain predominately business information and advice were removed and produced to Plaintiffs, as requested by opposing counsel. P&G revisited the log entries in an attempt to correct any auto-populating errors. (*Id.* ¶2.) If any auto-populating errors were missed, P&G is willing to revisit the log again, particularly in light of Plaintiffs' Third Amended

Complaint and Third Set of Requests to Produce Documents, which will inevitably push back the discovery calendar as to the production of P&G's documents relevant to Plaintiffs' claims.

Even despite P&G's continued cooperation in providing more detail in the privilege log, and its willingness to do so again, Plaintiffs have filed this Motion arguing that the privilege log is insufficient. But at the same time, Plaintiffs recently filed their Third Amended Complaint, followed a short time later by an additional **sixty-six (66)** discovery requests served upon P&G. P&G will now be forced to create and serve a supplemental privilege log. If the Court were to determine that there were issues with the current privilege log that prohibit Plaintiffs from evaluating the privileged nature of the documents, P&G can amend the log and include any changes in the supplemental log which will be produced after P&G is able to respond to Plaintiffs' new discovery requests. Lastly, it is also worth noting for the Court that Plaintiffs have failed to produce to P&G any privilege log regarding Plaintiffs' document production. As such, Plaintiffs have no basis to complaint about P&G's substantial efforts with respect to its privilege log, when Plaintiffs have wholly failed to produce any privilege log at all.

II. LEGAL AUTHORITY AND ARGUMENT.

The Federal Rules of Civil Procedure require those who withhold discovery due to a claim of privilege to provide to the party seeking the discovery a privilege log. FRCP 26(b)(5) and 45(d)(2). The privilege log must "describe the nature of the documents or things not disclosed in a manner that will enable the party seeking the discovery to assess the applicability of the privilege being claimed." *JLJ Inc. v. Santas Best Craft, LLC*, No. 3-:02-CV-513, 2004 U.S. Dist. LEXIS 31964, at *2–3 (S.D. Ohio May 28, 2004).

This Court has previously acknowledged that privilege logs should include the following information:

- A description of the document explaining whether the document is a memorandum, letter, e-mail, etc.;
- The date upon which the document was prepared;
- The date of the document (if different from # 2);
- The identity of the person(s) who prepared the document;
- The identity of the person(s) for whom the document was prepared;
- The purpose of preparing the document;
- The number of pages of the document;
- The party's basis for withholding discovery of the document (i.e., the specific privilege or protection being asserted); and
- Any other pertinent information necessary to establish the elements of each asserted privilege.

Cooey v. Strickland, 269 F.R.D. 643, 649 (S.D. Ohio 2010) (quoting *In re Universal Services Fund Tel. Billing Practices Litig.*, 232 F.R.D. 669, 673 (D. Kan. 2005)). Simply put, there must only be enough detail to prove that the documents in question contain "confidential information relating to legal advice." *Little Hocking Water Ass'n v. E.I. du Pont de Nemours & Co.*, No. 2:09-cv-1081, 2013 U.S. Dist. LEXIS 22213, *33–34 (S.D. Ohio Feb. 19, 2013).

The most recent privilege log produced by P&G complies with the relevant Federal Rules as it provides all information available based on the metadata of the document in question. The information provided is detailed enough for Plaintiffs to discern the nature of the documents that are privileged without P&G waiving the actual privilege or disclosing the contents of the document. Despite P&G's multiple efforts to appease Plaintiffs' demands for detail in the privilege log, Plaintiffs have objected to P&G's privilege log on numerous grounds, which P&G believes can be sorted into four categories. P&G will address each of those in turn.

A. P&G's Privilege Log Was Timely Disclosed.

Plaintiffs argue that P&G's production of its privilege log was untimely, and that as a result P&G has waived any asserted privilege. (Motion, Part IV(A).) In making this argument, Plaintiffs rely heavily on *Burlington Northern & Santa Fe Ry. v. United States District Court*, 408 F.3d 1142 (9th Cir. 2005). In *Burlington*, the plaintiff's production was unorganized and there were no assurances that the final document production represented the entirety of the plaintiff's documents. *Id*. at 1145–46. Even so, **both parties expected** to have a privilege log included with the first document production. *Id*. at 1145. The parties haggled over the privilege log for fourteen months after the magistrate judge ordered the plaintiff to produce responsive documents. *Id*. at 1146. The plaintiff removed documents from its privilege log but did not produce said documents. *Id*. The court ultimately determined that the plaintiff had waived its privilege based on the facts of the case, including that a timely log would not have been burdensome. *Id*. at 1149–50.

In examining the plaintiff's conduct in *Burlington*, the court stated that there is no "*per se* rule that failure to produce a privilege log in a timely manner triggers waiver of privileged." *Id*. at 1147. The court only affirmed the district court's prior decision that the privilege had been waived based on the **specific factual circumstances** of the case. *Id*. Other courts have agreed that waiver is not automatic. *See In Re Dep't of Justice Subpoenas to ABC*, 263 F.R.D. 66, 70 (D.Mass. 2009) (rejecting *per se* waiver requirement); *Carlson v. Freightliner, LLC*, 226 F.R.D. 343, 363 (D.Neb. 2004) (holding based on the advisory committee comments to Rule 26(b)(5) that a court may-but need not consider a privilege waived when a party fails to timely raise the objection, *aff'd by*, 226 F.R.D. 385 (D.Neb. 2004). Because waiver of the privilege is an 'exceedingly harsh sanction,' the court must consider waiver on a case-by-case basis after

consideration of all of the circumstances. *Wellin v. Wellin*, No. 2:13-CV-1831-DCN, 2:13-CV-3595-DCN, 2:14-CV-4067-DCN, 2015 U.S. Dist. LEXIS 135107, at *43–46 (D. S.C. July 31, 2015) (citing *Rambus, Inc. v. Infineon Techs. AG*, 220 F.R.D. 264, 274 (E.D. Va. 2004); *Ritacca v. Abbott Labs.*, 203 F.R.D. 332, 335 (N.D.Ill. 2001) ("In the end, the determination of waiver must be made on a case-by-case basis."); *see also, Smith v. Café Asia*, 256 F.R.D. 247, 250–51 (D.D.C. 2009) (courts have the discretion to determine that a party has waived privilege when that party fails to produce a privilege log).

As there is no *per se* rule for waiver to apply to this litigation, the Court should evaluate the facts using the factors suggested by the *Burlington* court. The *Burlington* court suggests several factors in examining each case:

1. Whether the litigant seeking discovery and the court can evaluate each of the withheld documents based on the privilege objection;

2. The timeliness of the objection and accompanying information about the withheld documents;

3. The magnitude of the document production; and

4. Other particular circumstances of the litigation that make responding to discovery unusually easy (such as the fact that many of the same documents were the subject of discovery in an earlier action) or unusually hard.

Burlington, 408 F.3d at 1151. The factors should be applied holistically, with an intent to prevent the abuse of the Federal Rules and discovery process. *Id.*; *see also Best Buy Stores, L.P. v. Manteca Lifestyle Ctr., LLC*, No. 2:10-cv-0389-WBS-KIN, 2011 U.S. Dist. LEXIS 62817, at *8–9 (E.D. Cal. June 13, 2011).

As applied to the factual circumstances here, the *Burlington* factors weigh in favor of P&G. In fact, the only overlap between the *Burlington* case and the litigation at hand is the five month time frame that Plaintiffs have made the lynchpin of their argument. P&G's document

productions have not been made in haphazard boxes, as was the case in Burlington. *Id*. at 1145. Instead, P&G has been methodically working its way through Plaintiffs' extensive discovery requests with the understanding the Plaintiffs would not expect a privilege log until Plaintiffs' document production, in response to all of Plaintiffs' discovery requests, was complete. (Barras Decl. ¶42, Ex. 14.) P&G also continuously and repeatedly answered directly, additional and ongoing questions from opposing counsel that significantly expanded the scope of discovery. (see, e.g., *id*. ¶¶33, 37-41, 44, 53–55, 60, Exs. 5, 9–13, 16, 25–27, 32.)

Furthermore, the opinion in *Burlington* suggests that the discovery requests related to the privilege log at issue were the final set of documents produced before the motion to compel. *Burlington*, 408 F.3d at 1145–46. Here, that is not the case. As discussed above, Plaintiffs have changed the scope of their discovery requests numerous times prior to the production of the privilege log. Even now, Plaintiffs have again changed the scope after filing this Motion by filing its Third Amended Complaint and by serving their Third Set of Requests for the Production of Documents. Despite all of this, P&G has attempted to produce a privilege log suitable to Plaintiffs' demands **three times**, all while engaging in ongoing discovery and additional motion practice. P&G's actions as evaluated by the *Burlington* factors strongly contradict Plaintiffs' theory that P&G has waived privilege, and the Court should reject Plaintiffs' argument.

Furthermore, a finding that P&G's privilege log was timely would be consistent with other jurisdictions' interpretations of the Federal Rules. Courts have declined to find waiver involving a delay of several months where extenuating circumstances were present. In *Carl Zeiss Vision Int'l GmbH v. Signet Armorlite Inc.*, the plaintiff timely served a privilege log, but failed to clearly identify certain "clearance opinions" in the privilege log until more than nine months after the court ordered the parties to provide privilege logs. No. 07-cv-0894-DMS, 2009 U.S.

Dist. LEXIS 111877, at *7–8 (S.D.Cal. Dec. 1, 2009). In declining to find waiver of the privilege, the court cited cases that have taken a permissive stance on deficient privilege logs. *Id.* at *14–15 (citing *United States v. Union Pac. R.R. Co.*, No. CIV 06-1740 FCD KJM, 2007 U.S. Dist. LEXIS 40178 (E.D.Cal. May 23, 2007) and *Humphreys v. Regents of the Univ. of Cal.*, No. C 04-03808 SI, 2006 U.S. Dist. LEXIS 34769 (N.D.Cal. May 23, 2006)).

Courts have also found that when the objecting parties make a good faith effort to provide a privilege log, privileges had not been waived. *Fid. & Deposit Co. v. Travelers Cas. & Sur. Co. of Am.*, No. 2:13-cv-00380-JAD-GWF, 2017 U.S. Dist. LEXIS 84070, at *13 (D. Nev. May 31, 2017). In *Best Buy Stores, L.P. v. Manteca Lifestyle Ctr., LLC*, the court declined to find waiver where the defendant relied on an informal understanding that the parties would exchange privilege logs at the end of the rolling production of documents. 2011 U.S. Dist. LEXIS 62817 at *8; *see also Jumping Turtle Bar and Grill v. City of San Marcos*, No. 10-CV-270-IEG, 2010 U.S. Dist. LEXIS 119390 at *10 (S.D. Cal. Nov. 10, 2010) (holding that, ". . . under the circumstances of this case, the production of a privilege log one and one half months late was not unreasonable."); *Coalition for a Sustainable Delta v. Koch*, No. 1:08-CV-00397, 2009 U.S. Dist. LEXIS 100728, at *11–14 (E.D. Cal. Oct. 15, 2009) (holding that a party's producing a privilege log two months after production of documents and seven months after the initial requests for production were propounded was nonetheless reasonable in the context of the case).

Additionally, courts generally find waiver only in cases involving unjustified delay, inexcusable conduct **and** bad faith. *Dept. of Justice Subpoenas to ABC*, 263 F.R.D. at 71 (stating that finding of waiver is appropriate when conduct evinces a 'deliberate pattern of delay' and is 'egregious'); *Welch v. Eli Lilly Co.*, No. 1:06-cv-0641-Rly-JMS, 2009 U.S. Dist. LEXIS 21417 at *14 (S.D.Ind. Mar. 16, 2009) (noting waiver is a serious sanction and declining to find the

privilege waived despite defendants inadequate privilege log and failure to meet their burden of proving the documents were indeed privileged); *White v. Graceland College Ctr. For Prof'l Dev. 7 Lifelong Learning, Inc.*, 586 F. Supp. 2d. 1250, 1266 (D.Kan. 2008) ("Acknowledging the harshness of a waiver sanction, however, courts have reserved such a penalty for only those cases where the offending party committed unjustified delay in responding to discovery.").

For example, in *Wellin v. Wellin*, the court found that there was no evidence of bad faith or unjustifiable delay on the part of the defendants in connection with the preparation of the privilege log or its supplementation. 2015 U.S. Dist. LEXIS 135107, at *43–46. Although approximately three months lapsed from the time the Requests for Production were initially answered and the privilege log was produced, the court noted that the parties were engaged in significant discovery with complex issues. *Id*. The court also considered the substantial number of documents and the defendants' attempts to comply with the plaintiff's requests in finding that there was no unjust delay or bad faith. *Id*.

There is no evidence of unjustified delay, inexcusable conduct, or bad faith in this matter. As evaluated by the *Burlington* factors, considering the original discovery requests and Plaintiffs' constant expansion of that scope, P&G produced its privilege log at the earliest time possible. P&G did not attempt to hide its privilege log from Plaintiffs, but kept them informed of the status of the log and went back to the log twice in order to address Plaintiffs' earlier objections to the content and format. Had P&G been acting in bad faith, it would not have made any of those efforts. Instead, it acted upon the understanding that each party's privilege log would be produced at the end of their respective document productions. Even if there was miscommunication between the parties, said miscommunication was not the product of bad intentions or malice as Plaintiffs would have this Court believe.

As there is no evidence of bad faith or inexcusable conduct from P&G, and as the current version of the privilege log was timely disclosed considering the circumstances of the parties' interactions and the progress of this litigation, Plaintiffs' argument that P&G has waived privilege based on the timing of its privilege log should fail.

B. P&G's Privilege Log Complies with the Applicable Rules.

Plaintiffs also argue that P&G's privilege log fails to comply with a number of the applicable requirements. That is not the case, and if the Court were to determine that the privilege log falls short of either the Federal Rules of Civil Procedure or the Local Rules of the Southern District of Ohio, any shortcomings can and will be addressed without the Court resorting to the harsh sanction of waiving P&G's privilege.

1. P&G's Privilege Log Complies with Federal Rules and Case Law.

Under FRCP 26(b)(5), a privilege log 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." (emphasis added). There must be a minimal showing that the communication or document contains legal matters, "but that showing need not be onerous and may be satisfied by as little as a statement in the privilege log explaining the nature of the legal issue for which advice was sought." *Cooey*, 269 F.R.D. at 649 (internal quotations omitted).

Plaintiffs argue that descriptions such as "third party document(s) transmitted by client to counsel for legal advice" are conclusory in nature and do not satisfy the federal requirements. (Motion, p. 8–9.) Plaintiffs use this **one** example to argue that all of the documents on P&G's privilege log are described in such a way. In fact, in the descriptions of the documents on the privilege log, P&G included the type of document, the individuals generally involved with the

document, and the subject matter of the legal advice given. These efforts comport with the federal standard and are sufficient to allow opposing counsel to assess the nature of the privileged document. For example, in addition to every other field of information on the log specifically identifying the date of the communication and recipients, P&G described one communication as "Email Communication between counsel and brand employees containing legal advice from counsel regarding Navarro image rights." This statement, and the other information fields, provide ample information for Plaintiffs to assess the privileged nature of the communication and the type of legal advice conveyed.

Therefore, P&G has met its obligation FRCP 26(b)(5) in providing enough information for Plaintiffs' to assess the privileged nature of P&G's claims without revealing the privileged information itself.

2. P&G's Privilege Log Complies with Local Rules and Case Law.

Under LR 26.1(a), a privilege log "shall refer to the specific request to which each assertion of privilege pertains." Furthermore, the log "shall list documents withheld in chronological order, beginning with the oldest document for which a privilege is claimed."

First, P&G's counsel specifically addressed the issue of chronological order in its last privilege log and emailed opposing counsel assuring them that the log was provided in chronological order. (Barras Decl. ¶59, Ex. 31.) Any issues with the chronological order of the log are therefore inadvertent due to the nature of sorting an Excel spreadsheet by one column and not made in bad faith and can be easily remedied.

Second, Plaintiffs have never raised the issue that P&G's privilege log does not specifically refer to each individual request. Given the fluidity of Plaintiffs' requests themselves, it would be nearly impossible for P&G to identify each individual request, as many of those

subsequent requests as detailed above were informally made in emails or phone conferences. Generally, the assertions in the privilege log relate to discussions about Ms. Navarro, the possibility of litigation, and the status of P&G's rights to distribute the various images.

3. Any Issues with the Format of P&G's Privilege Log Can Be Addressed Without Granting the Motion to Compel.

Even if the Court were to find deficiencies in P&G's privilege log, that finding does not necessitate a waiver of privilege. "When confronted with a deficient privilege log that fails to provide the necessary information to rule on attorney-client and work product objections, a trial court may order the responding party to provide a further privilege log that includes the necessary information to rule on those objections, but may not order the privileges waived because serving a deficient privilege log, or even failing to serve a privilege log, is not one of the three statutorily authorized methods for waiving the attorney-client privilege." *Catalina Island Yacht Club v. Superior Court*, 242 Cal. App. 4th 1116, 1120–21 (Cal. App. 4th 2015). Even "when a privilege log fails to provide a trial court with sufficient information to rule on the merits of a privilege objection, the only relief the court may grant . . . is an order requiring a further privilege log that provides the necessary information. *Id*. at 1121.

Here, if the Court were to agree with Plaintiffs that P&G's privilege log is deficient, that finding **does not mean** that P&G has waived privilege. Instead, the Court may order P&G to supplement the privilege log to address any deficiencies. Considering the sanctity of the attorney-client and work product privilege, this is the more prudent choice and will be less prejudicial to P&G. Furthermore, discovery is still on going, as evidenced by Plaintiffs' Third Amended Complaint and Third Set of Requests for Production, and the discovery period is likely to be extended due to Plaintiffs' own actions. There is time to address the privilege log without causing harm to Plaintiffs or P&G.

C. P&G's Privilege Log Lists Documents That Are Subject to Attorney-Client Privilege.

The documents identified in P&G's privilege log are subject to the attorney-client privilege. The attorney client privilege protects "[c]onfidential disclosures by a client to an attorney made in order to obtain legal assistance." *Fisher v. United States*, 425 U.S. 391, 405, 96 S. Ct. 1569, 48 L. Ed. 2d 39 (1976). "[T]he privilege exists to protect not only the giving of professional advice to those who can act on it but also the giving of information to the lawyer to enable him to give sound and informed advice." *Little Hocking Water Ass'n*, 2013 U.S. Dist. LEXIS 22213 at *13-14 (quoting *Upjohn Co. v. United States*, 449 U.S. 383, 390, 101 S. Ct. 677, 66 L. Ed. 2d 584 (1981)). The attorney-client privilege also applies to communications between the client and his attorney in which the client provides factual information necessary for the attorney to render a legal opinion and properly litigate the matter. *Graff v. Haverhill North Coke Co.*, No. 1:09-cv-670, 2012 U.S. Dist. LEXIS 162013, at *21 (S.D. Ohio Nov. 13, 2012) ("Thus, factual information conveyed by an employee to the attorney in the course of the factual investigation is protected[.]").

Plaintiffs object to the classification of these documents as privileged on seven grounds (Motion, Part IV(C)), which P&G has organized for the Court as those relating to the subject matter of the documents, recipients of the communication, the number of individuals involved, and the involvement of third parties. As discussed above, the information provided by P&G in the description of the documents is sufficient to demonstrate that the documents contain privileged information.

1. Documents Containing Business Advice Can Also Be Privileged.

Plaintiffs argue that multiple documents in P&G's privilege log are communications or memoranda sent or created for the purpose of giving business advice, not legal advice. (Motion,

pp. 15–16.) Plaintiffs make this argument with absolutely no proof other than an assumption that one of P&G's in house counsel could not possibly be acting in his legal capacity when communicating about the images and products at issue. Plaintiffs claim, again, without any support, that those documents and communications should not be privileged. However, the documents in the privilege log that Plaintiffs identify as potentially containing business advice are predominately communications containing and seeking legal advice related to this litigation and P&G's rights. As such, those documents should remain privileged.

Courts in this Circuit agree. "[D]ocuments prepared for the purpose of obtaining or rendering legal advice are protected **even though the documents also reflect or include business issues**." *In re OM Group Sec. Litig*., 226 F.R.D. 579, 587 (N.D. Ohio Feb. 28, 2005) (emphasis added) (citing *Picard Chemical Inc. Profit Sharing Plan v. Perrigo Co*., 951 F. Supp. 679, 685–86 (W.D. Mich. 1996)). Plaintiffs are correct in stating that some documents containing this kind of advice may not be privileged – however, that classification is not appropriate here. Only "[w]hen communications contain both legal advice and non-legal considerations, a court must consider 'whether the predominant purpose of the communication is to render or solicit legal advice.'" *Id*. (quoting *Pritchard v. County of Erie (In re County of Erie)*, 473 F.3d 413, 420 (2d. Cir. 2007)). Therefore, the entire communication, even the non-legal portions, will be protected from disclosure if seeking or giving legal advice is the predominant purpose of the communication. *Id*.

In determining whether a communication contains legal advice, the Sixth Circuit looks to the following key elements:

> (1) Where legal advice of any kind is sought (2) from a professional legal adviser in his capacity as such, (3) the communications relating to that purpose, (4) made in confidence, (5) by the client, (6) are at his instance permanently protected (7) from disclosure by himself or the legal adviser, (8) except the protection be waived.

Phipps v. Wal-Mart Stores, Inc., No. 3:12-cv-01009, 2018 U.S. Dist. LEXIS 37398, at *6 (M.D. Tenn. Mar. 7, 2018) (citing *Arkwright Mutual Ins. Co. v. National Union Fire Ins. Co.*, No. 93-3084, 1994 U.S. App. LEXIS 3828, at *17–18 (6th Cir. Feb. 25, 1994), *quoting U.S. v. Goldfarb*, 328 F.2d 280 (6th Cir. 1964)).

As applied here, the communications that Plaintiffs claim contain only business advice do not, in fact, fall into that category. The documents identified in P&G's privilege log all predominately contain legal advice. Even if a communication also contains information related to P&G's business, that information is relayed within the context of potential litigation with Plaintiffs or the actual litigation with Plaintiffs, depending on the timing of the communication. As multiple employees were involved with this matter within the brand, marketing, and legal teams for the relevant products (*see infra*, Part II(C)(3)), there were multiple requests for legal advice from P&G's in-house counsel both before and after Plaintiffs initiated this litigation. The kind of legal advice sought is identified in P&G's descriptions of the communication, and cannot be given in more detail without waiving privilege. (*See supra*, Part II(B)(1).)

The communications between P&G non-legal employees and legal employees seek and contain legal advice and were made predominately for that purpose. Therefore, even if the document or communication also contains business advice, the entire item is privileged.

2. Attorneys Are Involved in All Documents Listed on Privilege Log.

Plaintiffs claim that 102 entries were not sent directly to an attorney and did not copy an attorney with P&G's legal department. (Motion, pp. 12–14.) Upon receiving Plaintiffs' most recent set of objections concerning the privilege log, P&G revisited each document on the privilege log and confirmed that counsel was involved in each entry. (Barras Decl. ¶59, Ex. 31.) As explained above, portions of the privilege log were auto-populated based on the last email

within a chain of communications, and any errors identified by Plaintiffs are solely due to a glitch with the software involved in generating the privilege log. There has been no attempt to hide documents from Plaintiffs under the guise of privilege, as demonstrated by P&G's multiple attempts to revise the log and its own admission that some documents were inadvertently included earlier on in the process. Those documents have now been produced. (*Id*. ¶61.)

Plaintiffs have specifically argued that P&G failed to identify an attorney when employee Debbie Woelfel was involved. Ms. Woelfel is a member of the legal department and does assist with communicating legal advice on the handling of litigation matters. (*Id.* ¶63.) Any communications made by Ms. Woelfel are at the direction of the attorney assigned to handle the relevant litigation matter within P&G's in-house counsel department. Additionally, documents for which no specific individual has been identified as the author were prepared by P&G's legal department. (*Id*. ¶20) As previously explained, the members within P&G's legal department regularly shift roles. In some cases the metadata of a document did not show the actual origin of a document, but it is clear that the document came from P&G's legal department for the purpose of providing legal advice. (*Id*.) P&G has provided Plaintiffs with as much detail as possible in those cases. The same can be said for those entries where there is not a specific individual identified as the recipient.

Plaintiffs also raise issue with attorneys that are copied on communications. (Motion, p. 14.) Simply because an attorney is copied on a communication does not mean that the attorney was not the intended recipient. Again, P&G reviewed all documents on the privilege log and the communications were an attorney was copied, or those identified as being "between" counsel and brand employees, involve an attorney providing legal advice or receiving a request for legal advice in the email chain. P&G cannot speak to the individual habits of each brand employee

regarding which recipient they include in the "to" line, rather than "cc". Instead of making the same generalization that Plaintiffs have made, P&G evaluated each communication on a case-by-case basis and determined that the communications directly involved an attorney and were made for the purpose of requesting or providing legal advice.

Finally, Plaintiffs argue that P&G's attempts to supplement the log by adding attorneys to subsequent versions of the log clearly demonstrates that P&G is trying to create privileged documents out of nowhere. (Motion, pp. 14–15.) Again, the original versions of the log were created using an auto-populating software, which has been common practice for document reviews and productions of this magnitude. (Barras Decl. ¶2) Plaintiffs cannot punish P&G now for its attempts to rectify any issues with that process. To do so would discourage all parties moving forward from engaging in open dialogue regarding discovery issues before seeking judicial intervention. Plaintiffs' logic is nonsensical and this Court should not be swayed by its attempts to penalize P&G's cooperation.

3. Attorneys Can Provide Legal Advice to Numerous People.

Plaintiffs argue that communications to numerous individuals cannot be privileged. (Motion, Part IV(C)(5).) This simply demonstrates Plaintiffs' ignorance of the inner workings of P&G, despite counsel's multiple attempts to explain the set-up to counsel. At P&G, employees can be rotated between brands, sometimes on a yearly basis. (Barras Decl. ¶64.) This includes employees working for the development of certain products, the development of the brand as a whole, and the creation of marketing content to accompany the products and the brand. (*Id.*) Even the members of P&G's in-house legal team can switch roles or leave the company. (*Id.*) Because Ms. Navarro reached out to P&G employees several years ago, there have been multiple staffing changes in the departments that work in connection with the alleged infringing products.

As such, some communications in the privilege log would reasonably be sent to multiple parties to dispense legal advice to everyone involved in the dispute.

4. Third Parties on Email Chains Do Not Disrupt Later Legal Counsel.

Finally, Plaintiffs argue that eight of P&G's privileged documents were disclosed to third parties, and therefore have lost their privilege status. However, those documents should remain privileged for several reasons.

As the documents themselves are protected based on content, privilege has not been waived under the common-interest doctrine. The common-interest doctrine "protects communications disclosed to third parties under certain circumstances [and] extends to 'two or more parties' sharing a 'common interest' who are not parties to the same litigation." *Little Hocking Water Ass'n*, 2013 U.S. Dist. LEXIS 22213 at *63 (quoting *Cooey*, 269 F.R.D. at 652). The doctrine "applies only when all attorneys and clients have agreed to take a joint approach in the matter at issue" and such agreement need not be in writing. (*Id*.) The doctrine protects "communications regarding the common interest and intended to further that interest." (*Id*.)

The communications identified by Plaintiffs are subject to the common-interest doctrine. Originally, Plaintiffs named two marketing agencies that work closely with P&G as defendants in this lawsuit. The marketing agencies share P&G's goals to defend P&G's rights in this lawsuit. To further that end, P&G exchanged communications with the marketing agencies individually to discuss the lawsuit. These communications are subject to the common-interest doctrine and are privileged.

D. The Documents in the Privilege Log Are Subject to Work Product Privilege.

The documents identified as work product on P&G's privilege log are also protected by the work product privilege. The work product doctrine "is distinct from and broader than the attorney-client privilege." *In re Antitrust Grand Jury*, 805 F.2d 155, 163 (6th Cir. 1986). This doctrine "protects an attorney's trial preparation materials from discovery to preserve the integrity of the adversarial process." *In re Professionals Direct Ins. Co.*, 578 F.3d 432, 439 (6th Cir. 2009). The work product doctrine, incorporated into Fed. R. Civ. P. 26(b)(3), specifically protects (1) "documents and tangible things"; (2) "prepared in anticipation of litigation or for trial"; (3) "by or for another party or its representative." Fed. R. Civ. P. 26(b)(3). *See also Upjohn*, 449 U.S. at 398. "If the court orders discovery of those materials [documents and tangible things], it must protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of a party's attorney or other representative concerning the litigation." Fed. R. Civ. P. 26(b)(3)(B).

The Court must ask two questions to determine whether a document is protected by the work product doctrine: "(1) whether that document was prepared 'because of' a party's subjective anticipation of litigation, as contrasted with ordinary business purpose; and (2) whether that subjective anticipation was objectively reasonable." *In re Professionals Direct Ins. Co.*, 578 F.3d at 439 (citing *United States v. Roxworthy*, 457 F.3d 590, 594 (6th Cir. 2006)). If a document is prepared in anticipation of litigation, "**the fact that it also serves an ordinary business purpose does not deprive it of protection**[.]" *In re Professionals Direct Ins. Co.*, 578 F.3d at 439 (emphasis added) (citing *Roxworthy*, 457 F.3d at 595). The party seeking protection bears the burden of showing that "anticipated litigation was the 'driving force behind the preparation of each requested document.'" *In re Professionals Direct Ins. Co.* at 578 F.3d at

439 (quoting *Roxworthy*, 457 F.3d at 595). *See also Roxworthy*, 457 F.3d at 599 (stating that such documents do not lose protection under the work product doctrine "unless the documents 'would have been created in essentially similar form irrespective of the litigation'") (quoting *United States v. Adlman*, 134 F.3d 1194, 1202 (2nd Cir. 1998)).

Plaintiffs claim that the timing of the documents identified in P&G's privilege log prove that they were not prepared in anticipation of litigation. (Motion, Part IV(D).) However, the question that the Court must answer is whether or not the document was prepared because of the **prospect** of litigation generally. The documents may not be discounted simply because they were created before Plaintiffs filed their first complaint. As the Fourth Circuit noted in *National Union Fire Ins. Co.*, "[t]he document must be prepared *because* of the prospect of litigation when the preparer faces an actual claim or a potential claim following an actual event or series of events that reasonably could result in litigation." 967 F.2d 980, 984 (4th Cir. 1992). The driving force behind the creation of the document is crucial to evaluating whether it should be protected under the work-product privilege. *Id*. The timing of the document itself is not dispositive. *Wellin*, 2015 U.S. Dist. LEXIS 135107 at *71–75. Instead, surrounding factors should be considered to determine if litigation was a reasonable anticipation. *Id.*

Here, documents included on the privilege log that are protected by the work-product doctrine were prepared in anticipation of litigation. First, P&G attempts to maintain records of its trademarks and copyrights generally so that it may track the majority of those licenses in case there is ever litigation. The documents created for that purpose are included in the privilege log. Second, P&G creates documents to address potential conflicts when they are raised. In this instance, P&G's counsel communicated with Ms. Navarro long before the litigation was filed and before Ms. Navarro engaged counsel. Furthermore, P&G worked with other agencies

involved with the alleged infringing products to obtain releases, if necessary, related to the images named in Plaintiffs' pleadings. These circumstances gave P&G a reasonable belief that there was a prospect of potential conflict related to the images, and P&G created materials as a result of those communications in the anticipation of a potential conflict. The timing of these documents (which was pulled from the metadata and assigned to the respective document) fit within the timeline of in "anticipation" for this litigation.

E. Attorneys' Fees Are Not Appropriate.

As discussed above, Plaintiffs' motion should be denied on multiple grounds and the requested relief waiving P&G's privilege should not be granted. Under Rule 37, a court must not order attorneys' fees if the motion was filed before attempting to confer in good faith, the opposing party's nondisclosure was substantially justified, or other circumstances make an award of expenses unjust. Fed. R. Civ. P. 37(a)(5)(A). Each criterion requiring denial of the requested attorneys' fees is present here.

Plaintiffs cannot claim that there is any nondisclosure here, as P&G has provided its privilege log **three** times. Plaintiffs' true complaint is that it disagrees that P&G should have a certain number of privileged documents. Due to the size of P&G's document production (roughly 18,000 pages to date) and the number of individuals involved in this matter within the brand and legal department at P&G, the sizable number of privileged documents is not surprising. Furthermore, there are duplicates within the privilege log because the same communications were found with multiple custodians. (Barras Decl. ¶3) Given P&G's willingness to work with Plaintiffs to supplement not only its privilege log, but also its document production as a whole, an award of attorneys' fees would be severely unjust. P&G continues to make all efforts to cooperate and act in good faith with Plaintiffs. P&G should not be punished

for Plaintiffs' underhanded efforts to propound new discovery requests upon P&G that affected P&G's ability to produce a privilege log, or Plaintiffs' rash decision to pursue the Court's intervention when P&G has been willing to revise its privilege log to Plaintiffs' specifications. As such, the Court should not award Plaintiffs' attorneys' fees.

III. CONCLUSION.

P&G's actions in providing its privilege log to Plaintiffs, as well as the contents of the privilege log itself, do not warrant waiver of P&G's privilege. P&G's privilege log was timely provided given the subsequent demands for discovery made by Plaintiffs. P&G amended the privilege log twice to respond to Plaintiffs' objections and produced documents that were, upon further review, determined to be discoverable. These actions demonstrate that P&G has been acting in good faith throughout this process and has not intentionally delayed the production of its privilege log.

If this Court is inclined to grant any relief to Plaintiffs, any such relief should be limited to ordering P&G to supplement its privilege log as new document productions are made that are relevant to Plaintiffs' recently filed Third Amended Complaint the freshly served Third Requests for Production of Documents.

Dated: October 11, 2018

Respectfully submitted,

/s/ Karen Kreider Gaunt

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CERTIFICATE OF SERVICE

I hereby certify that on October 11, 2018, a true and correct copy of the foregoing *Defendant The Procter and Gamble Company's Memorandum in Opposition to Plaintiffs Annette Navarro McCall and Navarro Photography LLC's Motion To Compel Defendant The Procter & Gamble Company To Produce Documents Being Withheld Based Upon An Improper Claim Of Privilege* was served by electronic mail upon the foregoing:

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