UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

ANNETTE NAVARRO MCCALL, *et al.*,	:	Case No. 1:17-cv-406
	:	
	:	Judge Timothy S. Black
Plaintiffs,	:	
	:	
vs.	:	
	:	
THE PROCTOR & GAMBLE COMPANY, *et al.*,	:	
	:	
	:	
Defendants.	:	

ORDER REQUIRING DEFENDANT THE PROCTOR & GAMBLE COMPANY TO SUPPLEMENT ITS PRIVILEGE LOG AND SUBMIT DOCUMENTS FOR *IN CAMERA* REVIEW

This civil action is before the Court on Plaintiffs' motion to compel (Doc. 53) ("Motion to Compel"), as well as the parties' responsive memoranda (Docs. 64, 68).

I. BACKGROUND

The Motion to Compel arises in the context of a copyright dispute between Plaintiff Annette Navarro McCall ("Navarro"), Plaintiff Navarro Photography, LLC ("NPLLC") (collectively "Navarro"), and Defendant The Proctor & Gamble Company ("P&G").[1] (Docs. 53, 88). Navarro is a world-renowned photographer, residing in Cincinnati, Ohio. (Doc. 88 at ¶ 2). P&G is a multi-national consumer goods corporation, headquartered in Cincinnati, Ohio. (*See id.* at ¶ 4). In the Motion to Compel, Navarro

[1] Also involved in this case—though not in this motion—are Defendant Walmart, Inc. and Third-Party Defendant Libby Perszyk Kathman Holdings, Inc. (Docs. 53, 88, 94, 113).

asks the Court to compel P&G to produce certain information withheld on the basis of privilege. (*See* Doc. 53). The relevant facts follow.

On February 16, 2018, Navarro served her first set of discovery requests on P&G. (Doc. 53 at 8). On March 16, 2018, P&G served its responses to Navarro's first set of discovery requests. (*Id.*) Subsequently, the following exchanges took place, between the parties, regarding P&G's privilege log:

- March 16, 2018–April 26, 2018: Navarro issued various requests to P&G for a privilege log. (*See* Doc. 116; Doc. 117).[2]
- April 26, 2018: P&G offered to produce an incomplete privilege log to Navarro. (Doc. 116 at ¶ 5, Ex. D; Doc. 117 at ¶ 35, Ex. 7).
- June 23, 2018: P&G claimed that the parties had agreed to produce privilege logs after they completed document productions. (Doc. 116 at ¶ 8, Ex. F; Doc. 117 at ¶ 42, Ex. 14).
- June 25, 2018: Navarro claimed that the parties had agreed to produce privilege logs before they completed document productions. (Doc. 116 at ¶ 8, Ex. F; Doc. 117 at ¶ 43, Ex. 15).
- July 11, 2018: P&G informed Navarro that it would produce its privilege log after it completed document productions—to avoid supplementation. (Doc. 116 at ¶ 9, Ex. G; Doc. 117 at ¶ 45, Ex. 17).
- July 18, 2018: P&G produced its first privilege log to Navarro. (Doc. 116 at ¶ 11, Ex. I1; Doc. 117 at ¶ 47, Ex. 19).
- July 20, 2018: Navarro objected to P&G's first privilege log and requested supplementation. (Doc. 116 at ¶ 12, Ex. J1; Doc. 117 at ¶ 48, Ex. 20).

[2] "Doc. 116" refers to the Declaration of Robert Allen, submitted to the Court by Navarro *in camera*, under Local Rule 5.2.1(b). S.D. Ohio Civ. R. 5.2.1(b). "Doc. 117" refers to the Declaration of Andrew Barras, submitted to the Court by P&G *in camera*, under Local Rule 5.2.1(b). *Id.* The Court has filed these documents *ex parte* and under seal to ensure that this case has a proper record.

- August 3, 2018: P&G produced its second privilege log to Navarro. (Doc. 116 at ¶ 13, Ex. K1; Doc. 117 at ¶ 50, Ex. 22).

- August 3, 2018: Navarro objected to P&G's second privilege log and requested supplementation. (Doc. 116 at ¶ 14, Ex. L; Doc. 117 at ¶ 51, Ex. 23).

- August 20, 2018: P&G produced its third privilege log to Navarro. (Doc. 116 at ¶ 15, Ex. M1; Doc. 117 at ¶ 59, Ex. 31).

P&G's third privilege log (the "Privilege Log") contains 444 entries. (Doc. 116 at ¶ 15, Ex. M2). In the email transmitting the Privilege Log (the "Privilege Log Email"), P&G represented to Navarro that it had "reviewed" entries withheld under the attorney-client privilege, to determine whether an "attorney had meaningful[ly] participat[ed]" in them. (Doc. 116 at ¶ 15, Ex. M1; Doc. 117 at ¶ 59, Ex. 31). Also in the Privilege Log Email, P&G represented to Navarro that it had "reviewed" entries withheld under the work-product doctrine, to determine whether "they were created in anticipation of litigation." (Doc. 116 at ¶ 15, Ex. M1; Doc. 117 at ¶ 59, Ex. 31).

After receiving the Privilege Log, Navarro filed the Motion to Compel. (*See* Doc. 53). In the Motion to Compel, Navarro asks the Court to conclude: that P&G has waived its claims of privilege in their entirety, that P&G has failed to provide Navarro with an adequate privilege log, and that P&G has failed to support its claims of privilege with competent evidence. (*See generally* Docs. 53, 68). Moreover, in the Motion to Compel, Navarro asks the Court: to order P&G to produce the documents on the Privilege Log, and to order P&G to pay her costs and attorneys' fees. (*See generally* Docs. 53, 68). This Order follows.

II. STANDARD OF REVIEW

Rule 26 provides that a party may:

> Obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit.

Fed. R. Civ. P. 26(b)(1).

Rule 37 authorizes a party to "move for an order compelling an answer, designation, production, or inspection" if, *inter alia*, a corporation "fails to make a designation under Rule 30(b)(6)," a "party fails to answer an interrogatory submitted under Rule 33," or "a party fails to produce documents . . . as requested under Rule 34." Fed. R. Civ. P. 37(a)(3)(B). A district court enjoys broad discretion in managing discovery, and, as a result, a district court's decision to grant or deny a motion to compel is reviewed for an abuse of discretion. *See Lavado v. Keohane*, 992 F.2d 601, 604 (6th Cir. 1993).

III. ANALYSIS

In the context of this case, at this stage of the proceedings (prior to *in camera* review), the Court cannot determine whether P&G has waived its claims of privilege in their entirety. However, P&G has clearly failed to produce an adequate privilege log. And P&G has also failed to support its claims of privilege with competent evidence. Under such circumstances, the Court will order P&G to produce a revised privilege log.

And the Court will order P&G to submit documents for *in camera* review. *In camera* review will provide the Court with the information needed to analyze P&G's claims of privilege. Until the Court completes *in camera* review, the Court will defer issuing a decision on privilege waiver and attorneys' fees.

A. Whether privilege waiver is proper is deferred

Navarro argues that P&G has waived its claims of privilege because P&G did not produce a privilege log in a timely fashion. The Court defers this decision—for now.

Rule 26 provides that:

> When a party withholds information otherwise discoverable by claiming that the information is privileged or subject to protection as trial-preparation material, the party must: (i) expressly make the claim; and (ii) 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). A privilege log is the near-universal method of asserting privilege under Rule 26. *Avis Rent A Car Sys., LLC v. City of Dayton, Ohio*, No. 3:12-CV-399, 2013 WL 3781784, at *8 (S.D. Ohio July 18, 2013).

While Rule 26 does not say when a party must produce a privilege log, courts have held that a party's failure to timely do so results in waiver. *See Casale v. Nationwide Children's Hosp.*, No. 2:11-CV-1124, 2014 WL 1308748, at *8 (S.D. Ohio Mar. 28, 2014). However, whether waiver exists depends on a case-by-case inquiry. *See id.* "Given the sanctity of the attorney-client privilege and the seriousness of privilege waiver, courts generally find waiver only in cases involving unjustified delay,

inexcusable conduct[,] and bad faith." *Barger v. First Data Corp.*, No. 1:17-CV-4869, 2018 WL 6591883, at *7 (N.D. Ala. Dec. 14, 2018) (citation omitted).

Navarro argues that waiver is proper, as P&G failed to timely produce a privilege log. Navarro argues that five months elapsed between the service of Navarro's first discovery requests and the production of P&G's first privilege log. And Navarro argues that the parties agreed to produce privilege logs before they completed production. (Doc. 68 at 18–20). P&G counters that waiver is not proper, as P&G timely produced a privilege log. P&G argues that it offered to provide Navarro with an incomplete privilege log on April 26, 2018. And P&G argues that the parties never agreed to produce privilege logs before they completed production. (Doc. 64 at 9, 11, 17).

This is a close call. On the one hand, P&G dragged its feet, leading up to the production of its first privilege log. (Doc. 116 at ¶ 8, Ex. F; Doc. 117 at ¶ 43, Ex. 15). But, on the other hand, P&G offered to provide Navarro with an incomplete privilege log on April 26, 2018.[3] (Doc. 116 at ¶ 5, Ex. D; Doc. 117 at ¶ 35, Ex. 7). The Court concludes that whether P&G has acted in bad faith will turn on whether P&G's belated claims of privilege have merit. The Court will determine whether P&G's belated claims of privilege have merit after it completes the *in camera* review, discussed in Section D, *infra*. Until such time, whether privilege waiver is proper is deferred.

[3] Navarro argues that the Court "ordered" P&G to produce a privilege log at the June 11, 2018 status conference by telephone. (Doc. 68 at 20). However, as Navarro admits, such an order is absent from the Notation Order following the June 11, 2018 status conference by telephone. (Doc 53 at 9 n.3).

B. P&G has failed to produce an adequate privilege log

Navarro argues that P&G has failed to produce an adequate privilege log. The Court agrees.

Under Rule 26, a privilege log must describe the entries therein with sufficient detail to enable "other parties to assess the [accompanying] claim[s]" of privilege. Fed. R. Civ. P. 26(b)(5)(A). As a result, courts in this district have held that a privilege log should contain, *inter alia*: a description of the document, the date of the document, the persons who prepared the document, the persons for whom the document was prepared, the purpose of the document, the number of pages of the document, the basis for withholding the document, and any other information needed to establish privilege. *See Cooey v. Strickland*, 269 F.R.D. 643, 650 (S.D. Ohio 2010).

Moreover, under Local Rule 26.1, a "privilege log shall refer to the specific request to which each assertion of privilege pertains." S.D. Ohio Civ. R. 26.1(a). And a "privilege log shall list documents withheld in chronological order, beginning with the oldest document for which a privilege is claimed." S.D. Ohio Civ. R. 26.1(a); *United States v. Quebe*, No. 3:15-CV-294, 2017 WL 279539, at *10 (S.D. Ohio Jan. 23, 2017) (holding that a party's privilege log had failed to meet the requirements of Local Rule 26.1, as the party's privilege had log failed to, either set out the documents' request numbers, or list the documents in chronological order).

Navarro argues that the Privilege Log is inadequate, as it: fails to list senders/ recipients (for certain entries), fails to list request numbers (for all entries), and fails to use chronological order. Navarro also argues that the Privilege Log is inadequate, as

certain entries say that attorneys have "requested" legal advice from non-attorneys. (Doc. 53 at 12–13, 19–20). P&G argues that the Privilege Log is adequate, as: it lists senders/recipients (if/when known), omits request numbers (as their inclusion would be impractical), and largely uses chronological order. P&G does not respond to Navarro's final argument. (Doc. 64 at 22–24, 28).

Navarro's aforementioned concerns are valid. While the Privilege Log largely complies with the Federal/Local Rules, Navarro has properly identified some issues. The Privilege Log should, to the extent possible, list the sender/recipient for each entry, list the request number(s) associated with each entry, and organize all the entries in chronological order. Further, the Privilege Log should not say that attorneys have "requested" legal advice from non-attorneys. P&G shall produce a revised privilege log to Navarro, which remedies these issues, within seven days after the Court completes the *in camera* review, discussed in Section D, *infra*.

C. P&G has failed to support its claims of privilege

Navarro argues that P&G has failed to advance competent evidence in support of its claims of privilege. The Court agrees.

The burden of establishing a claim of privilege rests with the party asserting it. *Snyder v. Fleetwood RV, Inc.*, 303 F.R.D. 502, 505 (S.D. Ohio 2014) (attorney-client); *United States v. Roxworthy*, 457 F.3d 590, 593 (6th Cir. 2006) (work-product). If a claim of privilege is challenged, the party asserting it must establish "each element" by "competent evidence." *Cooey*, 269 F.R.D. at 649 (citation omitted and emphasis altered); *Comtide Holdings, LLC v. Booth Creek Mgmt. Corp.*, No. 2:07-CV-1190, 2010 WL

4117552, at *5 (S.D. Ohio Oct. 19, 2010) (stating that a party must establish the "factual predicate" for a claim of privilege by "competent evidence" (citation omitted)).[4]

Competent evidence can include sworn statements in affidavits, depositions, and interrogatory answers. *See Meadows v. Uniglobe Courier Serv. Inc.*, No. 5:08-CV-2530, 2009 WL 10719820, at *3 (N.D. Ohio July 29, 2009); *Amway Corp. v. Procter & Gamble Co.*, No. 1:98-CV-726, 2001 WL 1818698, at *4 (W.D. Mich. Apr. 3, 2001); *Welch Foods v. Packer*, No. 1:94-CV-814, 1995 U.S. Dist. LEXIS 16158, at *5 (W.D. Mich. July 14, 1995) ("[T]he proponent of the privilege must . . . bring the disputed documents or communications within the protection of the privilege, which can be done with affidavits or other competent evidence.").

Competent evidence cannot include conclusory assertions in legal briefs, privilege logs, or emails. *See Cooey*, 269 F.R.D. at 649; *Comtide*, 2010 WL 4117552, at *5 ("[A] privilege log is not itself evidence of the existence of a privilege;" thus, a claim of privilege "cannot be sustained purely on the basis of unsworn information in a privilege log."); *see also Siegmund v. Xuelian Bian*, No. 0:16-CV-62506, 2018 WL 3725775, at *7 (S.D. Fla. Aug. 1, 2018) (same); *Welch*, 1995 U.S. Dist. LEXIS 16158, at *5 ("In the Sixth Circuit, unsupported assertions of . . . privilege are strongly disfavored. Plaintiff does not meet its burden by mere conclusory or *ipse dixit* assertions." (citations omitted)).

[4] *Accord In re Haynes*, 577 B.R. 711, 740 (Bankr. E.D. Tenn. 2017) (If "the requesting party challenges the sufficiency of the assertion of privilege/protection, the asserting party may no longer rest on the privilege log, but bears the burden of establishing an evidentiary basis—by affidavit, deposition transcript, or other evidence—for each element of each privilege/protection claimed for each document or category of document." (citation omitted)).

Navarro has challenged P&G's claims of privilege, with respect to five categories of documents.[5] P&G has failed to support any of them with competent evidence.

1. *Entries in which an attorney is not a sender, a recipient, or a copied party*

The Privilege Log contains 102 entries, in which an attorney is not a sender, a recipient, or a copied party ("N3 entries"). (Doc. 116 at ¶ 18, Ex. N3). Navarro has challenged P&G's claim that the attorney-client privilege applies to these entries.[6]

The attorney-client privilege protects against the disclosure of attorney-client communications. *See Upjohn Co. v. United States*, 449 U.S. 383, 395 (1981). The attorney-client privilege attaches to communications, between an attorney and his/her client, regarding the provision of legal advice. *See id.*; *Fausek v. White*, 965 F.2d 126, 129 (6th Cir. 1992); *Snyder*, 303 F.R.D. at 505 (applying Ohio law); Ohio Rev. Code § 2317.02(A); *see also In re Powerhouse Licensing, LLC*, 441 F.3d 467, 472 (6th Cir. 2006) (noting that, in a diversity case, a court applies state law to resolve attorney-client claims and federal law to apply work-product claims).

P&G claims that the N3 entries constitute communications, between an attorney and his/her client, regarding the provision of legal advice. (*See* Doc. 64 at 27–28). But, P&G has not advanced competent evidence in support of this claim. Instead, P&G has

[5] Really, Navarro has challenged P&G's claims of privilege, with respect to seven categories of documents; however, Navarro's concerns regarding entries without senders/recipients and regarding entries that seek legal advice from non-attorneys are addressed in Section B, *supra*.

[6] P&G claims that the N3 entries fail to list an attorney as a sender, a recipient, or a copied party because of a computer "glitch." (Doc. 64 at 28). It should go without saying that a computer "glitch" does not excuse P&G from producing an accurate privilege log.

submitted the Privilege Log Email. The Privilege Log Email does not substantiate P&G's claim of privilege with factual information. Instead, the Privilege Log Email contains a conclusory statement: that P&G has "reviewed" the entries withheld under the attorney-client privilege, to determine whether an "attorney ha[s] meaningful[ly] participat[ed]" in them. (Doc. 116 at ¶ 15, Ex. M1; Doc. 117 at ¶ 59, Ex. 31).

This statement fails to constitute competent evidence for at least two reasons. First, the statement is not sworn.[7] Thus, the statement differs from those normally used to establish claims of privilege. *See Amway*, 2001 WL 1818698, at *4 (ordering P&G to produce documents, after noting that P&G failed support of its claims of privilege with "affidavit or other sworn evidence"). Second, the statement is conclusory. Instead of setting out each element of P&G's claim of privilege, it merely asserts that, on P&G's review, a privilege exists.[8] *See Cooey*, 269 F.R.D. at 649. Based on these deficiencies, P&G has failed to support its claim of privilege, with respect to the **N3** entries.[9]

[7] While the Barras declaration swears that Exhibit 31 contains a "true and accurate" copy of the Privilege Log Email, the Barras declaration does not swear that the representations made in the Privilege Log Email are—themselves—true and accurate. (Doc. 117 at ¶ 59, Ex. 31).

[8] The Privilege Log Email contains one more conclusory statement. It asserts that each of the entries on the Privilege Log "contain[s] a direct question to P&G's Legal Department or the specified attorney." (Doc. 116 at ¶ 15, Ex. M1; Doc. 117 at ¶ 59, Ex. 31). This statement does not change the Court's analysis. Even if this statement was sworn (which, as explained *supra*, it is not), all it would establish is that each of the Privilege Log entries contains a question, from an employee to an attorney; it would not establish that each of the Privilege Log entries contains a legal question, from an employee to an attorney. Of course, legal advice, as opposed to non-legal advice, is required to invoke the attorney-client privilege. *See Snyder*, 303 F.R.D. at 505; *see also Matter of Grand Jury Proceeding*, 68 F.3d 193, 197 (7th Cir. 1995) (If a "question[] do[es] not entail legal advice, the attorney-client privilege does not come into play.").

[9] Ms. Woelfel's involvement in some of these entries does not change the Court's analysis. While P&G has established that Ms. Woelfel worked for P&G's legal department (as a non-

2. *Entries in which an attorney is a copied party, not a sender or a recipient*

The Privilege Log contains 30 entries, in which an attorney is a copied party, not a sender or a recipient ("N6 entries"). (Doc. 116 at ¶ 21, Ex. N6). Navarro has challenged P&G's claim that the attorney-client privilege applies to these entries.

A communication does not obtain privileged status simply because an attorney is copied. *U.S. ex. rel. Fry v. The Health All. of Greater Cincinnati*, No. 1:03-CV-167, 2009 WL 5033940, at *2 (S.D. Ohio Dec. 11, 2009) (Non-privileged "communications between corporate officers or employees . . . do not attain privileged status solely because in-house or outside counsel is 'copied in'" them. (citation omitted)). The communication must, nonetheless, constitute a communication, between an attorney and his/her client, regarding the provision of legal advice. *See Waters v. Drake*, No. 2:14-CV-1704, 2015 WL 8281858, at *4 (S.D. Ohio Dec. 8, 2015).

P&G claims that the N6 entries constitute communications, between an attorney and his/her client, regarding the provision of legal advice. (*See* Doc. 64 at 28–29). But, P&G has not advanced competent evidence in support of this claim. Instead, P&G has submitted the Privilege Log Email. As stated in Section III.C.1, *supra*, the Privilege Log Email fails to set out the factual predicate for P&G's claim of privilege. Instead, the Privilege Log Email states (in unsworn/conclusory fashion) that P&G has reviewed the

attorney employee), P&G has not established that she sent/received the N3 entries at the direction of counsel. (Doc. 117 at ¶ 63 (stating only that Ms. Woelfel is a member of the legal department, and that Ms. Woelfel communicated about legal matters)). Thus, P&G has not established each element of the privilege asserted. *Cooey*, 269 F.R.D. at 649.

entries to determine whether an "attorney ha[s] meaningful[ly] participat[ed]" in them. (Doc. 116 at ¶ 15, Ex. M1; Doc. 117 at ¶ 59, Ex. 31). This is not competent evidence.

Moreover, neither the recitations in P&G's Privilege Log—that the N6 entries "request[] legal advice"—nor the assertions in P&G's legal brief—that P&G "revisited" the N6 entries—changes this conclusion. (Doc. 64 at 27; Doc. 116 at ¶¶ 15, 21, Exs. M1, N6). Courts in this district have held that such recitations/assertions are not competent evidence, sufficient to establish a claim of privilege. *See Comtide*, 2010 WL 4117552, at *5 (A legal brief "clearly is not evidence. Further, a privilege log is not itself evidence of the existence of a privilege . . . ."). Based on these deficiencies, P&G has failed to support its claim of privilege, with respect to the **N6** entries.

3. *Entries in which in-house counsel are copied alongside several non-attorneys*

The Privilege Log contains 94 entries, in which in-house counsel are copied alongside several non-attorneys ("N10 entries"). (Doc. 116 at ¶ 25, Ex. N10). Navarro has challenged P&G's claim that the attorney-client privilege applies to these entries.

Where "in-house counsel appears as one of many recipients of an otherwise business-related memo, the federal courts place a heavy burden on the proponent to make a clear showing that counsel is acting in a professional legal capacity and that the document reflects legal, as opposed to business, advice." *Graff v. Haverhill N. Coke Co.*, No. 1:09-CV-670, 2012 WL 5495514, at *21 (S.D. Ohio Nov. 13, 2012) (citation omitted). Where a communication contains both legal and business advice a court must

consider "whether the predominant purpose of the communication is to render . . . legal advice." *Cooey*, 269 F.R.D. at 650 (citation omitted).

P&G claims that the predominate purpose of the N10 entries is to render legal, as opposed to business, advice. (*See* Doc. 64 at 25–27). But, P&G has not advanced any competent evidence in support of this claim. Instead, P&G has merely submitted a declaration, asserting that P&G employees frequently rotate between brands. (Doc. 117 at ¶ 64 ("At P&G, employees . . . rotate[] between brands, sometimes on a yearly basis.")). While this declaration does explain why the N10 entries contain so many P&G employees,[10] this declaration does not explain whether the N10 entries contain legal, as opposed to business, advice. (*See id.*).

Indeed, the only "evidence" that the N10 entries contain legal, as opposed to business, advice comes from the recitations in P&G's Privilege Log—that the N10 entries "contain[] legal advice"—and the assertions in P&G's legal brief—that the N10 entries "contain legal advice." (Doc. 64 at 25–27, 29–30; Doc. 116 at ¶¶ 15, 25, Exs. M1, N10). As stated in Section III.C.2, *supra*, courts in this district have held that such recitations/assertions are not competent evidence, sufficient to establish a claim of privilege. *Comtide*, 2010 WL 4117552, at *5. Based on these deficiencies, P&G has failed to support its claim of privilege, with respect to the **N10** entries.

[10] Because the N10 entries copy both current and former department employees.

4. *Entries in which third-parties are copied*

The Privilege Log contains four entries in which third-parties are copied ("N11 entries"). (Doc. 116 at ¶ 26, Ex. N11). Navarro has challenged P&G's claim that the attorney-client privilege applies to these entries.

As a general rule, a party waives the attorney-client privilege by communicating information to a third-party. *Glazer v. Chase Home Fin. LLC*, No. 1:09-CV-1262, 2015 WL 12733393, at *2 (N.D. Ohio June 15, 2015). However, as an exception to the general rule, the "common interest doctrine" protects certain communications, between certain parties, in pursuit of a "common legal interest[]." *Little Hocking Water Assn., Inc. v. E.I. Du Pont De Nemours & Co.*, No. 2:09-CV-1081, 2013 WL 607969, at *20 (S.D. Ohio Feb. 19, 2013), *aff'd sub nom. Little Hocking Water Ass'n, Inc. v. E.I. Du Pont de Nemours & Co.*, No. 2:09-CV-1081, 2014 WL 5857994 (S.D. Ohio Nov. 12, 2014).

P&G claims that the N11 entries are protected, because P&G and the third parties copied thereon—Saatchi & Saatchi X, Landor Associates, and New View Management Group ("Third Parties")—share a common interest. (*See* Doc. 64 at 30). But, P&G has not advanced any competent evidence in support of this claim. For example, P&G has not submitted a joint defense agreement, establishing a contractual basis for the alleged common interest. And, for example, P&G has not submitted an affidavit, establishing an evidentiary basis for the alleged common interest. Instead, P&G has merely argued, in its brief, that the Third Parties "share[d] P&G's goals." (*Id.*)

As stated twice prior, such assertions in a legal brief fail to constitute competent evidence, sufficient to support a claim of privilege. *Cf. William Powell Co. v. Nat'l*

Indem. Co., No. 1:14-CV-807, 2017 WL 4315059, at *5 –9 (S.D. Ohio Sept. 26, 2017) (holding that a party had not waived the attorney-client privilege, by commutating information to third-parties, after concluding that the party had submitted sufficient "evidence"—as opposed to "conclusory assertions"—in support of its claim that the parties had a "common interest" (citation omitted)). Based on these deficiencies, P&G has failed to support its claim of privilege, with respect to the **N11** entries.

5. *Entries that were created before April 1, 2016*

Finally, the Privilege Log contains 32 entries that were created before April 1, 2016 ("N13 entries"). (Doc. 116 at ¶ 28, Ex. N13). Navarro has challenged P&G's claim that the work-product doctrine applies to these entries.[11]

The work-product doctrine protects documents "prepared in anticipation of litigation." Fed. R. Civ. P. 26(b)(3). Whether a document was prepared in anticipation of litigation turns on two questions: "(1) whether that document was created because of a party's subjective anticipation of litigation, as contrasted with an ordinary business purpose; and (2) whether that subjective anticipation was objectively reasonable." *Gruenbaum v. Werner Enters., Inc.*, 270 F.R.D. 298, 304 (S.D. Ohio 2010) (citation omitted). The party asserting the work product doctrine bears the burden of establishing its applicability.[12] *Roxworthy*, 457 F.3d at 593.

[11] Each of the 32 entries is also withheld on the basis of the attorney-client privilege. (Doc. 116 at ¶ 28, Ex. N13).

[12] P&G seems to argue that the work-product doctrine applies whenever litigation is a general possibility. (Doc. 64 at 32). The Court disagrees. *See Amway*, 2001 WL 1818698, at *6 (The work-product doctrine is not applicable "unless some specific litigation is fairly foreseeable at

P&G claims that it created the N13 entries in anticipation of litigation. (*See* Doc. 64 at 31–33). But, P&G has not advanced competent evidence in support of this claim. Instead, P&G has submitted the Privilege Log Email. The Privilege Log Email does not substantiate P&G's claim of privilege with factual information. Instead, the Privilege Log Email contains a conclusory statement: that P&G "reviewed" entries withheld under the work-product doctrine, to determine whether "they were created in anticipation of litigation." (Doc. 116 at ¶ 15, Ex. M1; Doc. 117 at ¶ 59, Ex. 31). As in Section III.C.1, *supra*, this unsworn and conclusory statement does not constitute competent evidence.

Moreover, the factual assertions in P&G's brief fail to support a claim of privilege. (Doc. 64 at 31–33 (claiming that P&G reasonably anticipated litigation, before April 1, 2016, because it "communicated with . . . Navarro long before" the case was filed, and worked with agencies to "obtain releases")). This is because no citation, to an affidavit, declaration, or other form of competent evidence, accompanies them. (*Id.*); *Comtide*, 2010 WL 4117552, at *5 (A legal brief "clearly is not evidence."). Based on these deficiencies, P&G has failed to support its claim of privilege, with respect to the **N13** entries.

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the time the work product is prepared. . . . The failure to specify the litigation for which documents were purportedly created is fatal to a claim of work-product protection" (emphasis added)); *CH2M Hill, Inc. v. Houston Gen. Ins. Co.*, No. 3:98-CV-1496, 1999 WL 1279369, at *1 (D. Or. Aug. 4, 1999) ("In order to qualify as work product, at the time the document was created, litigation must have been more than a general possibility; there must have been a substantial and specific threat that it would occur." (emphasis added)).

D. P&G must submit documents for *in camera* review

Navarro argues that the Court should require P&G to turn over all of the documents on the Privilege Log. The Court disagrees.

Where, as here, a court concludes that a party has failed to establish its claims of privilege, the court has a few different remedies at its disposal. The court can order the party to produce the documents withheld on the basis of the privilege. *See, e.g.*, *Zelaya v. UNICCO Serv. Co.*, 682 F. Supp. 2d 28, 38–39 (D.D.C. 2010). The court can order the party to submit an affidavit explaining the basis of the privilege. *See, e.g.*, *Meranus v. Gangel*, No. 1:85-CV-9313, 1991 WL 120484, at *4 (S.D.N.Y. June 26, 1991). Or, the court can order the party to submit the documents withheld on the basis of the privilege for *in camera* review. *See, e.g.*, *Comtide,* 2010 WL 4117552, at *5.

When selecting an appropriate remedy, the court should, of course, keep in mind that the disclosure of (potentially) privileged information is a serious matter. *See Comtide*, 2010 WL 4117552, at *5 (refusing to order the production of potentially privileged documents, absent the opportunity for *in camera* review, even though the party withholding them had failed to advance competent evidence in support of its claims of privilege); *see also Johnson v. City of Cincinnati*, 119 F. Supp. 2d 735, 742 (S.D. Ohio 2000) ("The law protects confidentiality and sanctity of the attorney-client relationship."), *aff'd*, 310 F.3d 484 (6th Cir. 2002).

In this case, the proper remedy is for P&G to submit the **N3**, **N6**, **N10**, **N11**, and **N13** entries (collectively the "*In Camera* Documents") to the Court for *in camera* review

(culled for any duplicates). (Doc. 116 at Exs. N3, N6, N10, N11, N13). As a result, within one week of the date of this Order, P&G shall complete the following procedure:

- P&G shall submit the *In Camera* Documents to the Court in a single tabbed binder, containing:
    - An index, setting out a description of each document, the date of each document, the persons who prepared each document, the persons for whom each document was prepared, the purpose of each document, the number of pages of each document, the basis for withholding each document, and any other information needed to establish privilege for each document,
    - Tabs, pairing each document with its respective entry on the aforementioned index, and
    - A list, setting out the names of all the attorneys, with respect to whom a privilege is asserted;
- P&G shall highlight each of the *In Camera* Documents, as follows:
    - P&G shall highlight in YELLOW any attorney(s)/other parties giving rise to the privilege(s) asserted,
    - P&G shall highlight in BLUE any underlying fact(s) giving rise to the privilege(s) asserted, and
    - P&G shall highlight in RED any third-parties who are listed as senders, recipients, or copied parties; and
- P&G shall file any additional affidavits that the Court needs to evaluate the privilege(s) asserted.

Once P&G has completed the aforementioned procedure, the Court will review the *In Camera* Documents promptly, so that the parties can move forward with discovery.

E. Whether attorneys' fees are proper is deferred

Finally, Navarro argues that it is entitled to the fees and expenses that it has incurred in bringing this motion. The Court defers this decision—for now.

Rule 37 governs the award of attorneys' fees, after a successful discovery motion. Fed. R. Civ. P. 37(a)(5)(A). Rule 37 provides:

> If the motion is granted—or if the disclosure or requested discovery is provided after the motion was filed—the court must, after giving an opportunity to be heard, require the party . . . whose conduct necessitated the motion . . . to pay the movant's reasonable expenses incurred in making the motion, including attorney's fees. But the court must not order this payment if: (i) the movant filed the motion before attempting in good faith to obtain the disclosure or discovery without court action; (ii) the opposing party's nondisclosure, response, or objection was substantially justified; or (iii) other circumstances make an award of expenses unjust.

Fed. R. Civ. P. 37(a)(5)(A).

Where, as here, the resolution of a discovery motion turns on the completion of an *in camera* review, numerous courts have held that it is proper to defer the issue of attorneys' fees, under Rule 37, until after the *in camera* review is complete. *See, e.g.*, *Emery v. Nat'l Union Fire Ins. Co.*, No. 2:12-CV-215, 2013 WL 11842002, at *3 (E.D. Wash. Apr. 26, 2013) (deferring the issue of attorneys' fees, under Rule 37, until after *in camera* review); *Taylor v. Pilot Travel Centers, LLC*, No. 4:09-CV-4170, 2011 WL 542123, at *5 (D.S.D. Feb. 8, 2011) (asking a party to resubmit its request for attorneys' fees, under Rule 37, after an *in camera* review).

In this case, the Court has concluded that P&G has failed to establish its claims of privilege by competent evidence. However, the Court has not (yet) concluded that P&G is required to produce the documents withheld on the basis of its claims of privilege. Whether production is proper will turn on the outcome of the forthcoming *in camera* review. For the time being, the Court denies Navarro's request for attorneys' fees—

without prejudice. Navarro is entitled to resubmit her request for attorneys' fees if the *in camera* review results in the production of documents. *Accord Emery*, 2013 WL 11842002, at *3; *Taylor*, 2011 WL 542123, at *5.

IV. CONCLUSION

The Court **ORDERS** P&G to provide the Court with the *In Camera Documents*, per the procedure set out in Section D, *supra*, for *in camera* review. Further, the Court **ORDERS** P&G to provide Navarro with a revised privilege log, per the direction set out in Section B, *supra*, within seven days after the Court completes the *in camera* review.

If P&G discovers that some of the *In Camera* Documents are not properly designated as privileged, P&G should produce such documents to Navarro, not submit such documents to the Court. The Court should only receive the *In Camera* Documents, for *in camera* review, that P&G maintains are properly designated as privileged. The Court will not penalize P&G for any decision to produce some of the *In Camera Documents* to Navarro voluntarily.

IT IS SO ORDERED.

Date: 7/5/2019

Timothy S. Black
United States District Judge