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January 9, 2020

VIA ECF

Hon. Lisa Margaret Smith
United States Magistrate Judge
United States District Court
Southern District of New York
300 Quarropas Street
White Plains, New York 10601

Re: Johnson-Harris v. USA (18 Civ 4517 (NSR))

Dear Judge Smith,

We write to bring to your attention a discovery dispute which occurred during the recent deposition of plaintiff. During the deposition, plaintiff revealed that she prepared a timeline of the incident which she gave to her formal counsel.¹ This issue which arose is whether the timeline is protected from disclosure by the attorney-client privilege.

Plaintiff testified that she did not make the timeline at the instruction of her former counsel; however, she informed the undersigned that she made it (and provided it) to her former counsel because she thought it would assist him. Defense counsel was invited to (and given free rein) to question plaintiff on why she wrote the timeline, and why she gave it to her attorney. Defense counsel chose not to pursue this line of questioning. Instead, he took the position that because the

¹ The undersigned obtained the files of plaintiff's former counsel, and the timeline was in the file with handwritten notes and various scribbles along the document.

attorney did not ask that plaintiff to prepare the timeline, it was not a protected communication between a client and her counsel.

We request a ruling that the timeline is privileged because it was made by a client, to give to her attorney, for the purposes of assisting with her legal proceeding. In re Asia Global Crossing, Ltd., 322 BR 247, 255 (Bankr S.D.N.Y. 2005) (noting that a “client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client, between the client and the client's lawyer (or certain representatives of the client and the lawyer)”). The Second Circuit has explained that “[w]hat is vital to the privilege is that the communication be made in confidence for the purpose of obtaining legal advice from the lawyer.” United States v. Kovel, 296 F.2d 918, 922 (2d Cir. 1961); In re Rivastigmine Patent Litig. (MDL No. 1661), 237 FRD 69, 79 (SDNY 2006). Whether the attorney requested the communication is irrelevant. United States v. Zolin, 491 U.S. 554, 562 (1989) (holding that the attorney-client privilege functions “to encourage full and frank communication between attorneys and their clients.”); In re Rivastigmine Patent Litig. (MDL No. 1661), 237 FRD 69, 73 (S.D.N.Y. 2006) (same); In re Grand Jury Subpoena Duces Tecum, 731 F2d 1032, 1037 (2d Cir 1984).

A copy of the relevant deposition testimony is attached hereto. Should Your Honor wish to view the timeline, we will promptly file a hardcopy with the court for an *in camera* inspection.

Thank you for your attention to this matter.

Yours etc.,

LAW OFFICE OF MICHAEL H. JOSEPH, P.L.L.C.



John V. Tait

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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MAXINE L. JOHNSON-HARRIS,
Plaintiff, Docket No.
18 Civ 4517 (NSR)
-against-

UNITED STATES OF AMERICA,
Defendant.

- - - - -x

300 Quarropas Street, 3rd Floor
White Plains, New York

December 19, 2019
10:00 a.m.

DEPOSITION of the PLAINTIFF MAXINE L.
JOHNSON-HARRIS, the Witness in the above-entitled
action, held at the above time and place, taken
before Joseph Danyo V, a Shorthand Reporter and
Notary Public of the State of New York, pursuant
to the Federal Rules of Civil Procedure, and
stipulations between Counsel.

* * *

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2 Q. Just to be clear, also with Mr.
3 Dominick Rendina, your former attorney.

4 A. Yes.

5 MR. LEE: Yes.

6 Q. So other than that stuff, any notes
7 or anything you jotted down for yourself?

8 A. Yes.

9 Q. Okay. Can you tell me about those?

10 A. So I made a timeline of the incident.

11 Q. Okay. A timeline of events relevant
12 to this case?

13 A. Relevant to this case, yes.

14 Q. Okay. Do you have it with you today?

15 A. I don't know.

16 Q. Do you mind taking a quick look?

17 MR. TAIT: Is this something your
18 former counsel asked you to do?

19 THE WITNESS: No. I did that.

20 MR. TAIT: Okay.

21 THE WITNESS: But, no.

22 Q. Okay.

23 A. Let me see.

24 MR. TAIT: I'm going to ask her a few
25 questions here as the basis for it.

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MR. LEE: What?

MR. TAIT: I'm going to ask her a few questions now to see what's the basis of her making these notes.

MR. LEE: Okay, so is it relevant to privilege?

MR. TAIT: Yes.

MR. LEE: It's a privilege issue, okay, so go ahead.

EXAMINATION

BY MR. TAIT:

Q. Did you share this with anyone?

A. Yes.

Q. Okay. Was it your former counsel?

A. Yes.

Q. Did he ask you to do this?

A. No.

Q. Where did you get the information from?

A. From my recollection of what took place and just from my -- the librarian in me. Yes.

MR. LEE: So counselor, I think from the plaintiff's responses that it seems

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like that document is not privileged. Do you concur or --

MR. TAIT: Well, let me quickly review this to see if it contains any privileged information.

MR. LEE: Sure. Let's go off the record.

(Whereupon, a short recess was taken.)

MR. LEE: Can we just go on the record for a second.

Counsel, the questions that -- I mean I know you want to have a discussion with your client. Are these specifically questions relating to whether this document here is privileged?

MR. TAIT: Yes. It absolutely refers to a Dominic Medina.

MR. LEE: Okay, but separately I'm just wondering if these questions are pertaining to your questions about privilege.

MR. TAIT: They are.

MR. LEE: Okay. We can go just back

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off the record.

[Discussion held off the record.]

(Whereupon, a short recess was taken.)

MR. TAIT: Back on the record.

So I conferred with my client, and she informed me that she made this for her attorney, her former attorney, Dominick Rendina, and she did give it to her attorney, so we're going to claim this as privileged.

We can mark this, and I'll hold onto it if you want to get a ruling. You can ask her questions about the formation of this four-page document.

MR. LEE: So you're saying that this is something that -- just to be clear on this, this is something that Ms. Johnson-Harris had provided to Mr. Rendina.

MR. TAIT: Yes.

MR. LEE: Do I have that right? Now, I believe she had testified earlier that this was not something that was created at

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the direction of an attorney, and I don't think that --

MR. TAIT: And you can ask her why this was created.

MR. LEE: But she's already testified that she -- the basis for it, so --

MR. TAIT: I'm not going to testify for her, but what she told me was she made this for her attorney to help him to assist him and she gave it to him.

Whether he required it or requested it that isn't relevant. It's a communication she made with her attorney.

MR. LEE: Well, our position is that if she made this -- well, I'll put it this way.

EXAMINATION

BY MR. LEE:

Q. Ms. Johnson-Harris, I believe earlier you had testified that you had created this document to organize your recollections about the timeline of events in this case; is that correct?

A. That's correct.

Q. Okay. I believe you had also

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2 testified that you had done this voluntarily on
3 your own initiative; is that correct?

4 A. Yes.

5 Q. Okay. And this is a yes or no
6 question; so I need this to be answered only yes
7 or no.

8 Yes or no; did Mr. Rendina ever ask
9 you to provide him with a document with a
10 timeline of your events?

11 A. No.

12 MR. LEE: So counsel, based on the
13 witness' testimony, I don't see any basis
14 for pulling this as privileged.

15 It's not something that was created
16 at the direction of an attorney. It's a
17 document that she created of her -- on
18 recollections in this case, and I don't
19 think that the mere fact that she turned
20 it over to an attorney then shields it
21 under the attorney-client privilege.

22 Now, if there are certain things in
23 that document that reflect attorney
24 communications, we're certainly open to
25 discussing the propriety of redacting

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2 certain portions of the document, but a
3 wholesale withholding of the document on
4 privileged grounds, the government
5 believes is improper.

6 MR. TAIT: Counsel, you failed to ask
7 the relevant question, and while she did
8 testify that she made this as a
9 recollection of her events and that her
10 attorney did not ask her to do it, you
11 forgot to ask her why she put on paper her
12 recollections of events and what she did
13 with it and what she intended to do with
14 it.

15 You can ask her now why she bothered
16 to put down on this piece of paper her
17 recollection of events.

18 MR. LEE: Well, I don't see what the
19 relevance of it is if it's not something
20 that's done on the direction of an
21 attorney.

22 If this protects communications, this
23 was not created to be a communication to
24 the attorney based on what she has done,
25 because she did it on her own volition.

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MR. TAIT: Well, you can have a communication with your attorney on your own volition. It's still protected. The protection doesn't only provide protections for communications that the attorney requests.

You can have a free and frank discussion with your counsel on whether they asked you to have that or not, and it's still protected.

Now, as I already represented to you, I spoke to my client, and she said she made this with the intent to give it to her attorney to assist her attorney.

Now, it's true her attorney did not ask for that, but she certainly did it with the intent and gave it to him.

That's a communication initiated by her to her attorney. That's protected by the attorney-client privilege. I suggest we mark this. I'll hold it, and then we can get a ruling on it.

MR. LEE: Well, let me ask a couple of more questions on this front.

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2 BY MR. LEE:

3 Q. Ms. Johnson-Harris, when
4 approximately did you create this document?

5 A. I'm not sure when I created it. I'm
6 not sure when I created it.

7 Q. Did you create it before or after
8 retaining Mr. Rendina as your attorney?

9 A. After.

10 Q. How soon after, to the best of your
11 recollection?

12 A. Months. Months afterwards. Months.
13 A year or more.

14 Q. Did you send this document to Mr.
15 Rendina?

16 A. Yes.

17 Q. Okay. And how did you send it to
18 him? By what means?

19 A. I'm not sure. I'm not sure.

20 Q. Did you send it to him by e-mail?

21 A. I'm not sure. I'm not sure if I did
22 or I'm not sure.

23 Q. Do you know if you sent it to him by
24 postal mail or --

25 A. No postal mail.

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2 Q. Okay. Did you ever send it to him by
3 fax?

4 A. No.

5 Q. Did you ever have any phone call with
6 Mr. Rendina discussing or reciting the contents
7 of this --

8 MR. TAIT: I'm going to object.

9 MR. LEE: Well, yes or no. Well,
10 strike that. Let me try to ask a
11 different question here.

12 MR. TAIT: Yes.

13 Q. Did you ever discuss the contents of
14 this document here that's at issue with Mr.
15 Rendina before sending it to him?

16 A. No.

17 MR. TAIT: I'm going to object to the
18 form on that. I mean I know it's tough to
19 ask your question without knowing the
20 contents.

21 MR. LEE: But what's the objection to
22 form? Just so that we make sure --

23 MR. TAIT: The objection to form is
24 it's not clear what you're asking, what
25 you -- you asked whether my client

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discussed the contents of this document
with her attorney.

It's a four-page single spaced
document with lots of contents, so I'm not
sure what exactly you're asking.

Q. Well, did you understand my question
Ms. Johnson-Harris? I can ask it differently if
you'd like.

A. Ask it differently. Yes, let's ask
it differently for me. Ask the question.

Q. So currently we're talking about a
document that you have provided to your attorney
that, broadly speaking, is supposed to be a
timeline of the events relevant to this case; is
that correct?

A. That's correct.

Q. That's the document I'm referring to
now in my questions --

A. Yes.

Q. -- understood?

A. Yes.

Q. Okay. Did you ever discuss either
this particular document or the substance or
contents of this document with Mr. Rendina before

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2 sending it to him?

3 MR. TAIT: Objection to form.

4 Q. You can answer.

5 A. Is there such a thing as going off
6 the record right now?

7 MR. TAIT: No.

8 Q. Not right now.

9 A. I don't know how to --

10 MR. TAIT: If you don't understand
11 the question --

12 A. I don't know how to --

13 MR. TAIT: If you don't understand
14 the question --

15 A. Ask the question again. I don't
16 understand it.

17 MR. TAIT: -- for your ability to
18 answer --

19 MR. LEE: Well, okay. I can ask the
20 question again, but --

21 MR. TAIT: Yes.

22 MR. LEE: Let's keep our objections
23 --

24 MR. TAIT: Sure.

25 MR. LEE: -- short and concise here.

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Q. So this document that we're talking about right now --

A. Yes.

Q. -- you understand which document I'm referring to?

A. Yes.

Q. Okay. Did you ever talk to Mr. Rendina about this document before sending it to him?

A. No.

Q. Okay. Did you ever talk about the contents or substance of what's in this document with Mr. Rendina before sending it to him?

MR. TAIT: Objection to form.

A. No.

Q. Do you currently use an e-mail address?

A. Yes.

Q. Did you ever use that e-mail address to send e-mails to Mr. Rendina?

MR. TAIT: I'm sorry. Did you say currently?

MR. LEE: Sorry. Strike that.

Q. Have you ever used your current

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2 e-mail address to send to or receive from Mr.

3 Rendina any e-mails?

4 A. Yes.

5 Q. Okay. And would you be able to
6 conduct a search of your e-mails to see whether
7 or not you sent this document or an electronic
8 copy of this document to Mr. Rendina?

9 A. No.

10 MR. TAIT: I'll represent it by
11 counsel that I had Mr. Rendina's files,
12 and this is in it.

13 Q. Do you recall any meeting where you
14 handed Mr. Rendina a copy of this document?

15 A. I don't recall.

16 Rul MR. LEE: Well, counsel, let's
17 mark this for a ruling, unless you have
18 any questions you want to ask the witness
19 as it pertains to the privileged nature of
20 this document.

21 MR. TAIT: No. We'll mark it for a
22 ruling.

23 MR. LEE: Yes. We'll mark it for a
24 ruling. Obviously, the government objects
25 to the privilege assertion.

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MR. TAIT: Are you going to mark the document?

MR. LEE: Yes. We'll mark it as Exhibit 1, a document currently being claimed to be withheld as privileged. We'll mark it for a ruling.

MR. TAIT: I'll note that I'll hold onto it.

(Whereupon, Defendant's Exhibit 1, a document claimed to be withheld as privileged was hereby marked for identification, as of this date.)

MR. LEE: I'll just note on the record to wrap this up that the parties have marked the -- let me start again.

The parties have marked for a ruling a document that was provided by Ms. Johnson-Harris at today's deposition, which is being held onto by her counsel.

There is a dispute between the parties as to whether this document should be withheld as privileged under the attorney-client privilege, and the parties will address that, and each side is

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reserving its rights as to the proprietary
of withholding that document.

MR. TAIT: Agreed.

Q. Separate from the document that we've
just been talking about and spent a bit of time
on, are there any other documents that you
created or any notes that you took to refresh
your recollection about the events in this case?

A. No.

Q. Did you bring with you today any
documents relevant to this case other than what
we just talked about?

A. No.

Q. Now, aside from this lawsuit, have
you ever been involved in any other legal
proceeding or lawsuit?

A. No.

Q. So you've never been sued?

A. No.

Q. Okay. And other than this case
you've never sued anyone or --

A. No.

Q. Okay. Have you ever testified under
oath before?