UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF PENNSYLVANIA

DOUGLAS S. CHABOT, et al, Plaintiffs, v. WALGREENS BOOTS ALLIANCE, INC., et al, Defendants.	CIVIL ACTION NO. 1:18-CV-2118 (JONES, C.J.) (MEHALCHICK, M.J.)

MEMORANDUM

This matter has been referred to the undersigned for purposes of resolving the discovery dispute raised by the parties regarding the production of communications and materials Defendants claim are protected by the attorney-client privilege. (Doc. 93). Specifically, Plaintiffs submit the following five guidelines Defendants should follow when determining production obligations:

> GUIDELINE NO. 1: Defendants shall produce and un-redact all documents or communications providing an update or report on the status of the FTC review process or discussions with the FTC, whether or not drafted or received by an attorney.
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> GUIDELINE NO. 2: Defendants shall produce and un-redact all documents containing information or analysis regarding the issues specifically identified in Defendants' interrogatory responses and motion to dismiss, whether or not drafted or received by an attorney, including but not limited to: the status of the ongoing dialogue and discussions between Walgreens and the FTC; the general nature and status of the FTC's feedback; the status of the sales process for potential store divestitures; reports and updates regarding the status of the merger and FTC review process provided by other Walgreens executives and personnel involved in the Rite Aid merger (including attorneys).
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> GUIDLINE NO. 3: Defendants shall fully produce all draft press releases, call scripts, media responses, proxies, and other statements to investors mentioning the FTC review, whether or not involving an attorney.

> GUIDELINE NO. 4: Defendants shall produce all communications with Rite Aid and Fred's or any other divesture buyer during the FTC review process, regardless of whether attorneys were involved.
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> GUIDELINE NO. 5: Defendants must re-review all previously withheld and redacted documents and issue a certification by a registered attorney in this case, under penalty of sanctions, that each document meets the legal standards for privilege and/or work product under Third Circuit law.

Defendants aver that the communications at issue convey various legal impressions and advice, that waiver did not occur because Defendants "explicitly disclaimed reliance on any privileged information," and the common interest doctrine applies to the privileged communications Walgreens had with Rite Aid and Fred's because all three companies shared the common interest of FTC approval of the merger. (Doc. 108-1). In addition to the parties' briefing on these issues (Doc. 99; Doc. 108; Doc. 115; Doc. 127), the Court held an oral hearing on January 17, 2020. (Doc. 120). Within a post-hearing brief, Defendants raised the prospect that the Court does not have the ability to issue guideline orders as to privileged documents. (Doc. 123-1, at 4-5). Following a discussion of the general issue of attorney-client privilege, the Court will examine whether categorical guidelines are proper. If so, the Court will address each guideline submitted in Plaintiffs' motion to compel.

I. LEGAL STANDARDS

A. ATTORNEY CLIENT PRIVILEGE

Attorney-client privilege, "the oldest of the privileges for confidential communications known to the common law," is centrally concerned with "encourag[ing] full and frank communication between attorneys and their clients and thereby promot[ing] broader public interests in the observance of law and administration of justice." *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981). To better guarantee the protection of the lawyer and the law, the

client must be able to fully disclose past wrongdoings to the attorney without fear that such disclosure will be used against him or her. *United States v. Zolin*, 491 U.S. 554, 562 (1989). Lines of communication between attorney and client must stay open so that the attorney can advocate effectively, with full knowledge of the client's factual and legal circumstances. *Zolin*, 491 U.S. at 562.

On the other hand, "because the attorney-client privilege obstructs the truth-finding process, it is construed narrowly." *Westinghouse Elec. Corp. v. Republic of Philippines*, 951 F.2d 1414, 1423 (3d Cir. 1991). "The privilege protects *only* those disclosures – necessary to obtain informed legal advice – which might not have been made absent the privilege." *Westinghouse Elec. Corp.*, 951 F.2d at 1423-24 (emphasis in original) (quoting *Fisher v. United States*, 425 U.S. 391, 403 (1976)). For a communication to be privileged, four elements must be present: "it must be (1) a communication (2) made between privileged persons (3) in confidence (4) for purpose of obtaining or providing legal assistance for the client." *In re Chevron Corp.*, 650 F.3d 276, 289 (3d Cir. 2011) (internal quotations omitted). The burden of proving these elements lies with the party asserting the privilege. *Stewart Title Guar. Co. v. Owlett & Lewis, P.C.*, 297 F.R.D. 232, 241 (M.D. Pa. 2013).

B. THE COURT'S ABILITY TO GUIDE PRODUCTION OF DOCUMENTS

In their Supplemental Opposition to Plaintiffs' Motion to Compel the Production of Documents, Defendants state that Plaintiffs "seek blanket orders that sweep aside the privilege status for entire, murky categories of documents. This is a lawless request: no case cited in the record – not even any case cited by Plaintiffs – has taken that approach." (Doc. 123-1, at 5). Defendants assert that privilege determinations should be made on a document

by document basis addressing only those specifically challenged before the court. (Doc. 123-1, at 5).

Contrary to Defendants' assertion, such request on the part of Plaintiffs is in fact lawful. Courts in the Third Circuit have often dictated guidelines for parties to follow when determining whether documents are privileged. After reviewing a sample of documents for "recurrent privilege issues," the United States District Court for the District of New Jersey "established some general directions" and stated, "These directions reflect the Court's holdings on those issues and should be applied to all documents of the type addressed by the rule, without regard to whether a particular document is discussed." *In re Gabapentin Patent Litigation*, 214 F.R.D. 178, 186 (D.N.J. 2003). In the Eastern District of Pennsylvania, after ruling on a group of selected documents, the court "directed the parties to attempt to resolve plaintiffs' challenges to other entries in defendants' privilege logs without the need for Court intervention based on the guidance provided by such rulings." *In re Niaspan Antitrust Litigation*, 2017 WL 3668907, at *1 (E.D. Pa. 2017). Finally, the Third Circuit, upon ordering a case be remanded on other grounds, stated, "where the cause is remanded for further consideration, we deem it advisable to discuss for future guidance the appropriate burdens and procedures in asserting the [attorney-client] privilege or an exception thereto." *Haines v. Liggett Group Inc.*, 975 F.2d 81, 94 (3d Cir. 1992). The court went on to say, "To explain our decision, it will be necessary first to analyze the particular privileges asserted here and to explain the different procedures necessary to establish an exception to the privilege and to justify an *in camera* review of proffered documents." *Haines*, 975 F.2d at 94. The court proceeded to discuss the requirements of the joint defense privilege, the crime-fraud exception, and the burdens to be

met in each. *Haines*, 975 F.2d at 95-96. The court concluded that *in camera* review was warranted. *Haines*, 975 F.2d at 96.

These cases show that courts, understandably, are afforded the authority to guide parties in producing documents. To lessen the burdens associated with *in camera* review, the Court may dictate its holding on contested issues, which the parties will then apply when determining whether its documents are privileged. *See In re Gabapentin Patent Litigation*, 214 F.R.D. at 186. Here, after discussing the law, the Court will examine available documents which include both redacted and unredacted language. The Court will then apply the law to those documents, and the parties will be expected to use such guidance in determining the privilege status of any remaining documents.

II. DISCUSSION

A. THE PRIMARY PURPOSE OF THE COMMUNICATION MUST BE LEGAL ADVICE.

> Many courts fear that businesses will immunize internal communications from discovery by placing legal counsel in strategic corporate positions and funneling documents through counsel… As a result, the courts apply the privilege cautiously, and require a clear showing that the attorney was acting in his professional legal capacity before cloaking documents in the privilege's protection.
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> PAUL R. RICE, ATTORNEY-CLIENT PRIVILEGE IN THE UNITED STATES. § 7:2 (2019) (hereinafter "RICE").

A communication may only be privileged if its primary purpose is to gain or provide legal assistance. *Kramer v. Raymond Corp.*, 1992 WL 122856, at *1 (E.D. Pa. 1992). The attorney must be "'acting as a lawyer' – giving advice with respect to the legal implications of a proposed course of conduct." *Hercules Inc. v. Exxon Corp.*, 434 F.Supp. 136, 147 (D. Del. 1977). For the assistance to be 'legal' in nature, the lawyer must guide future conduct by

interpreting and applying legal principles to specific facts. RICE § 7:10. The *primary* purpose of *each communication* deemed privileged must be to gain or provide legal assistance. *Kramer*, 1992 WL 122856, at *1.

"Merely because a legal issue can be identified that relates to on-going communications does not justify shielding them from discovery." *In re Vioxx Products Liability Litigation*, 501 F. Supp. 2d 789, 798 (E.D. La. 2007).[1] If business advice is the primary purpose of a communication, then the communication is not privileged. *In re Vioxx Products Liability Litigation*, 501 F. Supp. 2d at 806 n. 28. However if legal advice is primary with business advice incidental, or if non-legal services are "inextricably intertwined" with legal documents, then the communication will be privileged. *In re Vioxx Products Liability Litigation*, 501 F. Supp. 2d at 798-99.

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[1] The Court notes that much of the analysis performed in *In re Vioxx Products Liability Litigation* was done by Paul R. Rice, who served as Special Master and whose report the court largely reproduced. *In re Vioxx Products Liability Litigation*, 501 F. Supp. 2d at 791, 794. The court noted:

> Professor Rice is widely recognized as a leading scholar on the law of evidence, and particularly attorney-client privilege, having published several respected treatises and numerous articles and papers on the topic. Professor Rice also has considerable practical experience, having served as Special Master or Special Counsel in the following complex cases: from 1978 to 1981 he served as Special Master in United States v. AT & T, No. 74-1698 (D.D.C.); from 1981 to 1983 he served as Special Master in In re Amoxicillin Patent & Antitrust Litigation, MDL No. 328 (D.D.C.); from 1981 to 1982 he served as Special Master in Southern Pacific Communication Co. v. AT & T, No. 78-0545 (D.D.C.); and from 2002 to 2004 he served as Special Counsel in In re Microsoft Corp. Antitrust Litigation, MDL No. 1332 (D. Md.). In these various posts Professor Rice has been called upon to, among other things, review thousands of attorney-client privilege claims.
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> *In re Vioxx Products Liability Litigation*, 501 F. Supp. 2d at 792.

Specifically, at issue in Plaintiffs' first request to compel is the status of Defendants' communications describing discussions with the FTC and updates on the FTC review process. (Doc. 99, at 14-20). "Particularly where the attorney is providing both business and legal advice, the privilege does not apply when 'an attorney is merely conveying to his client the substance of what a third party has conveyed.'" *In re Generic Pharmaceuticals Pricing Antitrust Litigation*, 2020 WL 127743, at *2 (E.D. Pa. 2020); *ECDC Environmental, L.C. v. New York Marine and Gen'l Ins. Co.*, 1998 WL 614478, at *9 (S.D.N.Y. 1998) ("An attorney's communication to a client reporting facts learned by the attorney from a third party is not within the attorney-client privilege unless the information is included in legal analysis or advice communicated to the client."); *Notes Funding Corp. v. Bobian Investment Co, N.V.*, 1995 WL 662402, at *4 (S.D.N.Y. 1995) (an attorney's "reporting of developments in negotiations, if divorced from legal advice, is not protected by the privilege"). For privilege to attach to a report, description, or account of a third-party conveyance, the conveyance must be couched in legal analysis or advice.

This Court addressed a claim nearly thirty years ago when an insured sought to have its notice letter, as well as the letter's follow-up, to its insurance agent protected by attorney-client privilege because the letters "contained the mental impressions, opinions, and conclusions of [the insured's] in house lawyer." *U.S. Fidelity & Guar. Co. v. Barron Industries, Inc.*, 809 F.Supp. 355, 363 (M.D. Pa. 1992). The Court held these letters not protected. *U.S. Fidelity & Guar. Co.*, 809 F.Supp. at 364. In so doing, the Court explained that the privilege "applies only to discussions where the individual is acting as an advisor, i.e., presenting opinions and setting forth defense tactics as to the procedures to be utilized for an effective defense." *Fidelity & Guar. Co.*, 809 F.Supp. at 364. Because these letters were void of legal

theories or anticipated defenses – rather they discussed only facts – attorney-client privilege did not exist. *Fidelity & Guar. Co.*, 809 F.Supp. at 364.

When the primary purpose of a document or communication is not to provide legal advice, yet legal advice is included, then the legal advice is privileged only if it can be severed from the report itself. RICE § 7:3. "The burden is on the privilege proponent to differentiate the legal from the nonlegal." RICE § 7:3. When legal advice is excised from the document, each excised comment is independently judged as to its legal nature. *In re Vioxx*, 501 F. Supp. 2d at 802. If legal advice is not segregated, the proponent must show how the primary purpose of the entire document or communication is legal in nature. *Kramer*, 1992 WL 122856, at *1.

Finally, when a corporation expands the role of legal counsel into the world of business, the corporation's burden to show that counsel's communications are privileged also expands. *In re Vioxx*, 501 F. Supp. 2d at 799. "The structure of Merck's enterprise, with its legal department having such broad powers, and the manner in which it circulates documents, has consequences that Merck must live with relative to its burden of persuasion when privilege is asserted." *In re Vioxx*, 501 F. Supp. 2d at 799. Citing cases from California as well as New York, the court in *In re Vioxx* noted that when communications are simultaneously sent for review to both lawyers and non-lawyers, business and legal purposes are both being served so the document cannot be said to have a primary purpose of legal advice or assistance. *In re Vioxx*, 501 F. Supp. 2d at 805. These communications would not be privileged. *In re Vioxx*, 501 F. Supp. 2d at 805. The court prudently observes that corporations can easily send requests for legal advice – including attachments of email threads if need be – to only the attorneys, and it would be clear that the communications would be primarily legal.

In accordance with the above, the Court GRANTS Plaintiffs' request that Defendants shall produce and un-redact all descriptions of meetings and discussions with the FTC, the FTC's comments, or the FTC's feedback, whether or not drafted or received by an attorney and whether or not the document simply contains a "mere transcription" of FTC comments. However, if such descriptions are incidental to the communication of legal advice or assistance as explained herewith, then such description is privileged. If the communication serves primarily to describe such meetings, discussion, comments, or feedback, then any accompanying legal advice may be redacted.

Additionally, the Court GRANTS Plaintiffs' request that Defendants shall produce and un-redact all documents or communications providing an update or report on the status of the FTC review process or discussions with the FTC, whether or not drafted or received by an attorney, insofar as the information in such documents or communications originates from the FTC. Any documents or communications bearing the primary purpose of providing legal analysis or advice as explained herewith are privileged, although Defendants are cautioned that such analysis or advice must be conveyed within the privileged document.

B. FAIRNESS DICTATES THAT WHEN INFORMATION IS PUT AT ISSUE IT MUST BE DISCLOSED.

Privilege is waived when the communication between the client and attorney, *i.e.* the privileged information, is made a substantive issue in the litigation. RICE § 9:45. When a party relies on privileged information to establish a defense, that information loses its privilege. RICE § 9:46 (citing *U.S. Fire Ins. Co. v. Asbestospray, Inc.*, 182 F.3d 201, 212 (3d Cir. 1999)). The information must have been made a substantive issue in the litigation. RICE §

9:45. If the success of the client's claim or defense turns on what was said during the confidential communication, then the communications are put at issue. RICE § 9:45. However, the party seeking privilege need not directly say that counsel was relied upon. *In re Broadcom Corp. Securities Litigation*, 2005 WL 1403516, at *1 (C.D. Cal. 2005). "It may also arise from more indirect evidence where a party affirmatively raises an inference of reliance on counsel for the party's own benefit." *In re Broadcom Corp. Securities Litigation*, 2005 WL 1403516, at *1. The core principle underlying this waiver is fairness. RICE § 9:45.

Attorney-client communications are not automatically put at issue when the client's state of mind is in question. *Rhone-Poulenc Rorer Inc. v. Home Indem. Co.*, 32 F.3d 851, 864 (3d Cir. 1994). However, asserting a "good-faith belief" defense puts at issue the communications leading to good-faith belief, waiving privilege around those communications. *United States v. Medicor Associates, Inc.*, 2014 WL 12588331, at *6 (W.D. Pa. 2014) (citing *Cox v. Adm'r*, 17 F.3d 1386, 1419 (11th Cir. 1994) (noting that affirmatively asserting good faith, rather than mere denial of criminal intent, injects the issue of the client's knowledge of the law into the case)). The consequences of a client's statement as to belief are summarized well by the court in *In re Broadcom Corp. Securities Litigation*:

> Rather than simply deny scienter, defendants assert good faith based on an expectation the lawyers would tell them if anything illegal was happening. Defendants have injected an issue that requires examination of the attorneys' communications with defendants to see if defendants are corroborated… Plaintiffs are now entitled to review the attorneys' communications on the subject topics to see if defendants are telling the truth.
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> *In re Broadcom Corp. Securities Litigation*, 2005 WL 1403516, at *2.

Furthermore, if, through the defense of reliance on advice of counsel, the client is also relying on the inference that contrary advice was not received, fairness requires that communications

with all attorneys on the same subject be discoverable. *See McKesson Information v. Trizetto Group, Inc.*, 2005 WL 2290191, at *1 (D. Del. 2005) ("[O]nce an alleged infringer relies on the opinion of counsel as a defense to the charge of willful infringement in one of my cases, the alleged infringer must disclose to the patentee 'all of the information it possessed prior to or at the time it obtained opinions of counsel as to the subject matters discussed in the opinions.'").

The Third Circuit addressed this waiver in a fraud case arising from a trust company's role in a stock repurchase transaction. *Glenmede Trust Co. v. Thompson*, 56 F.3d 476, 478 (3d Cir. 1995). Glenmede was a trust company serving as private trustee for the Thompson family, as well as trustee for Pew Charitable Trusts. *Glenmede Trust Co.*, 56 F.3d at 479. Both held stock in Oryx. *Glenmede Trust Co.*, 56 F.3d at 479. Glenmede discussed with Oryx a direct buyback of some of its stock held by the Pew Charitable Trusts, and in the process consulted with its attorneys as to whether the Oryx transaction could also include Glenmede's private trust and investment advisory clients. *Glenmede Trust Co.*, 56 F.3d at 479. Glenmede's attorneys responded with an opinion letter stating that it would be illegal for Glenmede to include its private clients in the Oryx transaction and that private clients could not be notified. *Glenmede Trust Co.*, 56 F.3d at 479. The transaction went forward as to the shares held in the Pew Charitable Trusts, and Glenmede's private clients were excluded. *Glenmede Trust Co.*, 56 F.3d at 479.

The Thompson family subsequently sued Glenmede for fraud, breach of fiduciary duty, and other claims arising from the transaction. *Glenmede Trust Co.*, 56 F.3d at 479. Glenmede responded that it "was advised by counsel that it was legally precluded by Internal Revenue Code prohibitions from including Oryx shares held by other accounts in the

repurchase transaction." *Glenmede Trust Co.*, 56 F.3d at 479-80. Glenmede produced the opinion letter advising exclusion of private clients in the Oryx transaction, as well as a draft of the opinion letter, conceding that its attorney-client privilege was waived as to the primary subject of the opinion letter from counsel. *Glenmede Trust Co.*, 56 F.3d at 480. Yet, Glenmede argued that the waiver did not cover "the totality of the advice rendered regarding the buy-back transaction." *Glenmede Trust Co.*, 56 F.3d at 480.

The court did not agree with Glenmede. It stated that the party asserting reliance on advice of counsel should not define the parameters of the waiver so as to limit the scope of discovery, as that would undermine fairness. *Glenmede Trust Co.*, 56 F.3d at 486.

> The party opposing the defense of reliance on advice of counsel must be able to test what information had been conveyed by the client to counsel and vice-versa regarding that advice – including whether counsel was provided with all material facts in rendering their advice, whether counsel gave a well-informed opinion and whether that advice was heeded by the client.
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> *Glenmede Trust Co.*, 56 F.3d at 486.

The court held that Glenmede had waived the attorney-client privilege as to all communications, both written and oral, to or from counsel, as to the entire Oryx transaction. *Glenmede Trust Co.*, 56 F.3d at 487. Any documents which "may lead to the discovery of admissible evidence regarding what information had been conveyed to Glenmede about the structure of the buy-back transaction and the advice of counsel in that regard" were compelled to be produced. *Glenmede Trust Co.*, 56 F.3d at 487.

In another case occurring within the Third Circuit, a defendant-employer ("Dana"), facing a sexual discrimination claim, denied liability by asserting that he performed an adequate investigation of allegations. *Harding v. Dana Transport, Inc.*, 914 F.Supp. 1084, 1094

(D.N.J. 1996). To perform the "adequate investigation," Dana had hired his attorney, Mr. Bowe. *Harding*, 914 F.Supp. at 1088. As to materials otherwise privileged, the court held:

> By asking Mr. Bowe to serve multiple duties, the defendants have fused the roles of internal investigator and legal advisor. Consequently, Dana cannot now argue that its own process is shielded from discovery. Consistent with the doctrine of fairness, the plaintiffs must be permitted to probe the substance of Dana's alleged investigation to determine its sufficiency. Without having evidence of the actual content of the investigation, neither the plaintiffs nor the fact-finder at trial can discern its adequacy. Consequently, this court finds that Dana has waived its attorney-client privilege with respect to the content of Mr. Bowe's investigation of the plaintiffs' allegations. This waiver extends to documents which may have been produced by Mr. Bowe or any agent of Defendant Dana that concern the investigation.
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> *Harding*, 914 F.Supp. at 1098.

With this law in mind, the Court must now turn to what Defendants may have put at issue. The preliminary statement in Defendants' Brief in Support of their Motion to Dismiss tells the story of this case: "Three Rite Aid shareholders alleging they were defrauded by false statements made to inflate Rite Aid's stock price." (Doc. 39, at 4). Walgreens allegedly made these statements by "encourag[ing] Rite Aid shareholders to harbor false expectations about the likelihood of FTC approval." (Doc. 39, at 4). Defendants end this preliminary statement by describing two inferences that could be drawn as to their motivations for the allegedly fraudulent statements:

> The first, on which the Complaint depends, is that Walgreens made five fraudulent statements for no discernible purpose.
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> The second inference, in contrast, is simple and logical: When Walgreens executives continued to engage with the FTC, expressed confidence in the deal, and disputed negative news reports, they did so because they believed—based on what they knew—that regulatory approval was obtainable and the news reports were inaccurate. When feedback from the FTC warranted changes to the merger, Walgreens and Rite Aid made those changes and updated investors. Because this inference is more compelling, the Complaint should be dismissed.

(Doc. 39, at 5-6).

In Reply to Plaintiffs' Brief in Opposition to the Motion to Dismiss, Defendants continued to base their defense around what they knew:

> Plaintiffs fail to rebut the simple, benign inference offered by Defendants: Walgreens executives sought to keep *Walgreens'* investors (not Rite Aid's) informed, their statements genuinely reflected the information they possessed, and they disclosed FTC developments in real time. Because this inference is more compelling than the pointless fraud Plaintiffs allege, dismissal is required…

(Doc. 49, at 6).

Though any material which merely relays FTC-sourced information should not be privileged, these pleadings show that Defendants have placed at issue what they knew about the FTC review process. They explicitly state that they made the allegedly fraudulent statements "because they believed – based on what they knew – that regulatory approval was obtainable and the news reports were inaccurate." (Doc. 39, at 6). This clearly puts at issue, thus waiving from privilege, any documents and communications related to the regulatory approval and the status of the FTC review process. *See Glenmede Trust Co.*, 56 F.3d at 487. Defendants' subsequent pleading that "their statements genuinely reflected the information they possessed," again places at issue all information which they possessed which bears relevance to the statements they made. *See In re Broadcom Corp. Securities Litigation*, 2005 WL 1403516, at *2 ("Defendants have injected an issue that requires examination of the attorneys' communications with defendants to see if defendants are corroborated… Plaintiffs are now entitled to review the attorneys' communications on the subject topics to see if defendants are telling the truth.").

For the foregoing reasons, the Court GRANTS Plaintiffs' request that Defendants shall produce and un-redact all documents containing information or analysis regarding the status of the FTC review process, including but not limited to: the status of the ongoing dialogue and discussions between Walgreens and the FTC; the general nature and status of the FTC's feedback; the status of the sales process for potential store divestitures associated with this merger; and reports and updates regarding the status of the merger and FTC review process provided by other Walgreens executives and personnel involved in the Rite Aid merger (including attorneys).

C. ANY DOCUMENT PREPARED OR CIRCULATED FOR A PRIMARY PURPOSE OTHER THAN LEGAL ADVICE MUST BE DISCLOSED.

Any document, including drafts and press releases, will only retain their privilege if they are made for the purpose of giving or receiving advice directed at handling the client's legal issues. *In re Chevron Corp*, 749 F. Supp. 2d 141, 165 (S.D.N.Y. 2010). For an entire document to be privileged, the attorney must be primarily rendering legal advice on the document as a whole. *In re Vioxx*, 501 F. Supp. 2d at 800. If the document is not made for the primary purpose of communicating legal advice or is not itself a legal instrument, any edits or notations bearing the primary purpose of legal advice may be segregated and redacted. *In re Vioxx*, 501 F. Supp. 2d at 802-03.

Where attorneys electronically respond to mixed-purpose non-privileged attachments with their legal advice, the original non-privileged documents are still discoverable. *In re Vioxx*, 501 F. Supp. 2d at 806. The issue of superimposing legal advice onto otherwise discoverable communications was addressed by the court in *In re Vioxx* as follows:

> Through the line edits, Merck has claimed that what was otherwise discoverable, as a mixed purpose communication, is now made non-

> discoverable because of the manner in which its lawyers *chose* to reveal their advice. This is not acceptable. Merck cannot be permitted to deprive adversaries of discovery by voluntarily *choosing* to electronically superimpose that legal advice on the non-privileged and, therefore, discoverable communications. Of course, where the client's communications were found to be privileged, the line edits on those documents were found to be privileged also, when the other elements of the privilege, namely 'primarily for legal advice,' were found to be satisfied.
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> *In re Vioxx*, 501 F. Supp. 2d at 806 (emphasis in original).

In this case, the attorney is the master of his communication. He or she could choose to convey advice under separate cover. The non-privileged document does not become privileged only because the attorney chose to implant advice on the document itself. Again, the line edits may be excised and justified as independently privileged, but the document on which they appeared remains discoverable.

Privilege attaches to only those drafts which are "prepared or circulated for the purpose of giving or obtaining legal advice and contain information or comments not included in the final version."[2] *Andritz Sprout-Bauer, Inc. v. Beazer East, Inc.*, 174 F.R.D. 609, 633 (M.D. Pa. 1997). Additionally, if the communication or document is sent to anyone who does not need the information to carry out their work or make effective decisions on the part of the company, then the privilege is lost. *Andritz Sprout-Bauer, Inc.*, 174 F.R.D. at 633. Client communications preceding and addressing the final approved draft of a document which is destined for third-

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[2] At this point, it bears noting that Exhibit 24 may only be privileged if the draft press release explicitly communicates Mr. Brusser's legal advice. A press release which merely "reflects" an attorney's comments, i.e. integrates the comments without exposing the substance of the advice itself, is not privileged. (Doc. 108-7, at 4) ("Exhibit 24 reflects Mr. Brusser's comments…"); *see Kramer*, 1992 WL 122856, at *1.

party distribution will be protected if an intent of confidentiality is made clear. RICE § 7:13. It is worth repeating that the privileged documents must be made for the primary purpose of communicating legal advice, as opposed to public relations advice. *Haugh v. Schroder Investment Management North America Inc.*, 2003 WL 21998674, at *3 (S.D.N.Y. 2003). The attorney must perform functions materially different from those that any ordinary public relations advisor would perform. *Haugh*, 2003 WL 21998674, at *3.

For these reasons, the Plaintiff's request that Defendants shall fully produce all draft releases, call scripts, media responses, proxies, and other statements to investors mentioning the FTC review, whether or not involving an attorney, shall be GRANTED insofar as such documents were not created or communicated with the primary purpose of giving or obtaining legal advice.

D. THE COMMON-INTEREST DOCTRINE PROTECTS ONLY THOSE COMMUNICATIONS DISCUSSING SHARED INTEREST SUBJECT MATTER.[3]

"The common-interest doctrine allows for two clients to discuss their affairs with a lawyer, protected by the attorney-client privilege, so long as they have an identical (or nearly identical) legal interest as opposed to a merely similar interest." *United States v. Doe*, 429 F.3d 450, 453 (3d Cir. 2005) (internal quotation omitted). For the communications to be protected, the parties must have a community of interests with respect to the subject matter of the communications. RICE § 4:35. The doctrine allows "parties with common interests [to] join forces for the purpose of obtaining more effective legal assistance. *In re Leslie Controls, Inc.*, 437

[3] The community-of-interest doctrine protects only the confidentiality of privileged communications. *In re Chevron Corp*, 650 F.3d at 290 n. 19.

B.R. 493, 496 (Bankr. D. Del. 2010) ("The common interest doctrine 'allows attorneys representing different clients with similar legal interests to share information without having to disclose it to others.'"). To apply, the common interest must be shared at the time of the communications' sharing. RICE § 4:36. However, some adverse interests may exist separate and apart from the privileged 'common interest communications' for which the interest is shared. *McLane Foodservice, Inc. v. Ready Pac Produce, Inc.*, 2012 WL 1981559, at *5 (D.N.J. 2012).

The privilege does not apply to communications in furtherance of a common business interest. The parties must share a common legal interest and the communication at issue must have been to further that legal effort. *Matter of Bevill, Bresler & Schulman Asset Management Corp.*, 805 F.2d 120, 126 (3d Cir. 1986). The exchange of information "must have been intended and reasonably believed to be in furtherance of their joint defense or common interests and made with the intention that they be confidential." RICE § 4:35. "The weight of the case law suggests that, as a general matter, privileged information disclosed during a merger between two unaffiliated businesses would fall within the common-interest doctrine." *Cavallaro v. U.S.*, 153 F. Supp. 2d 52, 62 (D. Mass. 2001).

For the privilege to apply, an attorney must be on either the sending or receiving end of the communication. *In re Teleglobe Communications Corp.*, 493 F.3d 345, 364 (3d Cir. 2007); *Matter of Bevill, Bresler, & Schulman Asset Management Corp.*, 805 F.2d at 126. "The requirement that the clients' separate attorneys share information (and not the clients themselves) derives from the community-of-interest privilege's roots in the old joint-defense privilege, which [] was developed to allow *attorneys* to coordinate their clients' criminal defense strategies." *In re Teleglobe Communications Corp.*, 493 F.3d at 364-65. A communication loses its privilege when

it is sent between separately represented clients outside the presence of a lawyer. *Wayne Land and Mineral Group, LLC v. Delaware River Basin Commission*, 2020 WL 762835, at *7 (M.D. Pa. 2020) (quoting *In re Teleglobe Communications Corp.*, 493 F.3d at 364).

Here, the Court is satisfied that Walgreens shared a common legal interest with Rite Aid and Fred's insofar as all three parties were interested in FTC approval of the merger. Any communication with the attorneys of these parties bearing the primary purpose of communicating legal advice furthering how both recipient and sender can achieve FTC merger approval IS protected under the community-of-interest doctrine. Any adversarial communications with these third parties relating to negotiations between themselves, or any subject other than FTC approval of the merger, IS NOT protected. *See Matter of Bevill, Bresler & Schulman Asset Management Corp.*, 805 F.2d at 126.

However, as established *supra*, Defendants have placed at issue what they knew about the FTC review process. Therefore, any communications on this subject, the only subject protected by the community-of-interest doctrine, lose the protection of privilege due to this waiver.

E. DEFENDANTS ARE CAUTIONED TO ABIDE BY THE LEGAL STANDARDS.

To determine whether Plaintiffs' final request is necessary, the Court will undertake a brief review of some of the exhibits for which the Court has access to both the unredacted and redacted material. Defendants are expected to utilize attorney-client privilege with care and with good-faith.

1. Exhibit 14

Defendants assert that Exhibit 14, an email sent from Mark Vainisi ("Vainisi"), Senior

Vice President of Global Mergers and Acquisitions at Walgreens to four individuals who are either senior executives or attorneys at Walgreens, relays legal advice. (Doc. 108-8, at 1, 10). Vainisi asserts that the primary purpose of the email was to provide a summary of comments sent by Rite Aid's deal counsel, Skadden, Arps, Slate, Meagher & Flom LLP ("Skadden") to Rite Aid's counsel for the Fred's deal and that it reflected Skadden's legal advice as to changes a press release needed after Skadden had conferred with the FTC. (Doc. 108-8, at 10). Vainisi states that this email relays Skadden's legal advice. (Doc. 108-8, at 10).

Vainisi also asserts that this email contains his reflection of Weil's legal assessment and analysis of the FTC's feedback, including "Weil's legal advice and recommendations about the next steps Walgreens should take to advance the FTC approval process as well as Weil's advice regarding the appropriate strategy going forward." (Doc. 108-8, at 10-11).

Review of the redacted material does not bear out a reflection of legal assistance or advice. (Doc. 100-1, at 29; Doc. 115-1, at 7). There is no mention of legal implications and there is no mention of attorney advice. (Doc. 100-1, at 29). All of the information appears to flow from Vainisi himself. (Doc. 100-1, at 29). He makes no mention of Skadden. (Doc. 100-1, at 29). Legal principles are plainly not mentioned, nor implicated, in the redacted Exhibit 14 material. *See* RICE § 7:10. The court in *In re Vioxx* spoke to emails such as this when it said, "Merely because a legal issue can be identified that relates to on-going communications does not justify shielding them from discovery." *In re Vioxx*, 501 F. Supp. 2d at 798. The redacted material must have been sent primarily for the purpose of communicating legal advice. *In re Vioxx*, 501 F. Supp. 2d at 798. Upon review, Defendants fail to carry their burden of persuasion and this exhibit should not be privileged.

2. Exhibit 42

Exhibit 42 is an email sent by Charles Greener ("Greener"), Walgreens' Senior Vice President of Global Communications and Corporate Affairs, regarding Stefano Pessina's ("Pessina") upcoming meeting with the Bloomberg News editorial staff. (Doc. 123-2, at 1-2). Defendants assert that this email is a request to Walgreens General Counsel, Marco Pagni ("Pagni"), for legal advice and opinion in preparation for the meeting. (Doc. 123-2, at 2). In order to receive informed legal advice, Greener communicated Pessina's thoughts about the meeting to Pagni. (Doc. 123-2, at 2).

First, this email is not just a request to Marco Pagni, as Defendants represent, but is addressed to "All," including at least one non-attorney with the public relations company Finsbury. (Doc. 115-1, at 18). Again, the portion that Defendants seek to claw back is very clearly not privileged. (Doc. 115-1, at 18, 23). Greener, a non-lawyer, conveys to the group how Pessina, another non-lawyer, felt after talking to him the previous evening. (Doc. 115-1, at 18). The information is entirely public relations focused. (Doc. 115-1, at 18). This portion of the email communicates no legal advice or assistance, therefore it is not privileged. (Doc. 115-1, at 18).

3. Exhibit 43

Exhibit 43 is an email sent by Steven K. Bernstein ("Bernstein"), a partner at Weil Gotshal & Manges, LLP ("Weil"). (Doc. 108-3, at 1). Weil served as outside antitrust counsel to Walgreens in connection with its proposed merger with Rite Aid. (Doc. 108-3, at 1). Bernstein states that he sent this email to "a select number of employees" at Walgreens, including Walgreens General Counsel. (Doc. 123-5, at 2). In the email, Bernstein "discuss[es] Weil's strategy concerning when and how to communicate with the FTC Staff concerning the

FTC's review of the proposed Merger." (Doc. 123-5, at 2). He also allegedly "expressed my assessment and analysis, informed by and based on my experience in antitrust law and precedent transactions involving FTC review, regarding what the potential focus of FTC discussions might be concerning Walgreens' proposal and pending open issues." (Doc. 123-5, at 2).

The first two sentences of this email, sent at 2:12 pm on August 24, 2016, merely relay factual information collected from a third party (the FTC) and are clearly not privileged. *See In re Generic Pharmaceuticals Pricing Antitrust Litigation*, 2020 WL 127743, at *2 (privilege does not apply when an attorney conveys to his client the substance of what a third party has conveyed). The next sentence runs closer to the privilege line, as there is a small chance Bernstein's knowledge of this subject came from studying the law. However, the more likely scenario is that this information came directly from FTC communications to Bernstein, making it the substance of what a third party has conveyed. *See In re Generic Pharmaceuticals Pricing Antitrust Litigation*, 2020 WL 127743, at *2. Furthermore, there is no indication that this email is intended to guide future conduct, as necessary to qualify for legal advice or assistance. *See* RICE § 7:10. This email should not be privileged.

4. Exhibit 44

Defendants assert that Exhibit 44 "reflected legal advice [Vainisi] had received from Weil regarding the FTC's potential reaction to the divestiture package." (Doc. 123-1, at 12). First, this email is sent from a non-attorney to three other non-attorneys. (Doc. 115-1, at 38). Though this does not automatically preclude privilege, it does raise a yellow flag. *In re Vioxx*, 501 F. Supp. 2d at 805 (noting that business and legal purposes are often simultaneously served when documents are sent to both attorneys and non-attorneys for review). As to the

substance of this email, it very clearly states at the beginning, "we need to understand the *financial* impact it would cause if we end up being required to do this." (Doc. 115-1, at 38, 40). The email then explicates that financial impact. (Doc. 115-1, at 38). Legal advice or assistance is very clearly not included in this material. The claim of privilege for this communication borders on frivolous.

5. Exhibit 45

According to Defendants, the redacted material in Exhibit 45 "reflected store information gathered and analyzed by [Walgreens] personnel 'based on [Weil's] legal advice as to what would satisfy the FTC Staff's concerns." At this point, the Court should reemphasize that putting legal advice into action does not constitute the communication of legal advice or assistance itself. The privilege "applies only to discussions where the individual is acting as an advisor, i.e., presenting opinions and setting forth defense tactics as to the procedures to be utilized for an effective defense." *Fidelity & Guar. Co.*, 809 F.Supp. at 364. "Merely because a legal issue can be identified that relates to on-going communications does not justify shielding them from discovery." *In re Vioxx*, 501 F. Supp. 2d at 798.

Like Exhibit 44, the redacted information was sent between non-attorneys. The material contained in the October 31, 2016, email from Vainisi to Jillian Elder ("Elder"), a Walgreens employee, (Doc. 123-1, at 11), contains business, rather than legal, advice. (Doc. 115-1, at 42). Furthermore, the thoughts expressed in this email come entirely from Vainisi, a non-lawyer. (Doc. 115-1, at 42) ("I thought…" and "I am not sure…"). The redacted material in the October 31 email is not privileged. (Doc. 115-1, at 42, 45). The material claimed in the October 28, 2016, email is also not privileged. It is sent from Elder, a non-attorney, and communicates her modifications to the store package and how she feels the

modifications will affect the package. She clearly does not communicate legal advice or assistance. (Doc. 115-1, at 42, 45).

6. Exhibit 46

Defendants submit that Exhibit 46 should be privileged because it addresses an analyses of store information that was requested by Weil as part of Weil's legal services to Walgreens. The October 31 email from Vainisi to Schreibman is again between two non-attorneys and does not contain legal advice. (Doc. 115-1, at 48, 52). It merely conveys how Vainisi assesses the ongoing situation. (Doc. 115-1, at 48) ("I told her yesterday *I think*…"). The October 28 email from Elder is discussed above as part of Exhibit 45. (Doc. 115-1, at 42, 45, 49, 53). Exhibit 46 is not privileged.

7. Exhibit 47

Exhibit 47 is an email chain dated November 20, 2016, between Vainisi and Elder, two non-attorneys. (Doc. 115-1, at 56-65). The only material in this exhibit which is available in both redacted and unredacted form is an email sent from Elder to Vainisi at 1:45 pm. (Doc. 115-1, at 57, 63). Elder communicates to Vainisi the steps she is currently taking, and a question she has regarding "rebranding." (Doc. 115-1, at 57). Rebranding is public relations based, rather than legal. Furthermore, the email is clearly rooted in Elder's own knowledge, not that of an attorney. (Doc. 115-1, at 57) ("Only question is *as I figure the rebranding*…" and "*I'm using my judgment, not sure*…"). Again, this privilege assertion is meritless.

8. Exhibit 48

Plaintiffs submit that the factual portion of Exhibit 48 should be excised from the remaining document, and that the status report does not have a primarily legal purpose. (Doc. 115, at 26). Defendants respond that this draft presentation was sent from Counsel at Weil to

Walgreens' attorneys for review and input. (Doc. 123-1, at 14-15). The presentation included an analysis of the issues around the FTC investigation and how Walgreens should proceed. (Doc. 123-1, at 15). It also included advice, analysis, and distillation of conversations, key matters, and next steps. (Doc. 123-1, at 15-16).

At this juncture, the Court is not in possession of the privileged content within Exhibit 48. (Doc. 115-1, at 77-81). Still, it appears from the titles to each slide that the primary purpose of the document as a whole was to render legal advice or assistance. (Doc. 115-1, at 77-81). If that assumption is correct, then the factual information contained in the document is privileged as well. *See In re Vioxx*, 501 F. Supp. 2d at 798-99 (if the document communicates business advice but the primary purpose of the document as a whole is legal, then the entire document is privileged).

III. CONCLUSION

After reviewing these exhibits, it is clear the Defendants have overstepped the boundaries of attorney-client privilege. Two of the eight exhibits could easily be considered frivolous. For these reasons, the Court **GRANTS** Plaintiffs' request that Defendants must re-review all previously withheld and redacted documents and issue a certification by a registered attorney in this case, under penalty of sanctions, that each document meets the legal standards for privilege and/or work product under Third Circuit law. The Court further finds that categorical guidelines are properly applied in this matter. Plaintiffs' motion (Doc. 93) is GRANTED. An appropriate Order follows.

Dated: June 11, 2020

s/ Karoline Mehalchick

KAROLINE MEHALCHICK
United States Magistrate Judge