UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

GOOGLE, LLC and ALPHABET INC., a single employer

and

COMMUNICATIONS WORKERS OF AMERICA, AFL-CIO

and

EDWARD GRYSTAR, an Individual

and

KYLE DHILLON, an Individual

and

COMMUNICATIONS WORKERS OF AMERICA, AFL-CIO

and

KATHRYN SPIERS, Intervenor

and

SOPHIE WALDMAN, Intervenor

and

PAUL DUKE, Intervenor

and

REBECCA RIVERS, Intervenor

Cases 20-CA-252802
20-CA-252902
20-CA-252957
20-CA-253105
20-CA-253464

SPECIAL MASTER'S THIRD INTERIM REPORT AND ORDER

PAUL BOGAS, Administrative Law Judge. On September 17, 2021, Associate Chief Administrative Law Judge Gerald M. Etchingham issued an order appointing me as Special Master for the purpose of making an *in camera* inspection of documents that the Intervenors subpoenaed, but which the Respondent (Google) has withheld based on

an assertion of attorney-client privilege and/or work product privilege. This Report rules on the contested assertions of privilege with respect to the documents submitted to me in what the Respondent has designated as "Binder 1 of 7" -- which contains documents identified in the privilege log as items V5-0001 to V5-0200. These documents were identified by the Respondent as among those responsive to the Intervenors' subpoena requests for communications relating to the Respondent's hiring of IRI Consultants and Project Vivian, Subpoena Duces Tecum B-1-1D82C6J, Requests 13 and 14,[1] but which the Respondent (Google) has withheld based on an assertion of attorney-client privilege and work product privilege.[2] Of the document in the range covered by Binder 1 of 7, the Intervenors challenge the Respondent's assertions of privilege with respect to all items except: V5-0003, V5-0007 to V5-0013, V5-0033, V5-0042 to V5-0049, V5-0075, V5-0083 to V5-0085, V5-0111, V5-0121 to V5-0124, V5-0126, V5-0129, V5-0137, V5-0140, V5-0161, V5-0162, V5-0169, V5-0180, V5-0182, V5-0189, and V5-0196.

In two prior Interim Reports and Orders, I ruled on the documents contained in two other binders submitted to me by the Respondent for *in camera* inspection. Those binders contain documents identified by the Respondent in the privilege logs as items V4-0001 through V4-0149 and V5-1275 through V5-1358.[3] The legal standards and relevant findings set forth in Special Master's First Interim Report and Order (dated November 26, 2021) and Special Master's Second Interim Report and Order (dated December 17, 2021) are also applicable here. That includes the legal standards regarding how in-house counsel is treated for purposes of evaluating assertions of privilege and my finding that IRI was a 3rd-party outside the attorney-client relationship that provided antiunion messaging and message amplification advice, not expertise necessary for the provision of professional legal advice. In the instant report, in addition to ruling on the disputed documents within the V5-0001 to V5-0200 range, I direct the Respondent to make an additional submission regarding the documents it has identified in the privilege logs as items V5-0201 through V5-1274. Specifically for those documents, and with the exception of those for which the Intervenors do not dispute the assertions of privilege, I direct the Respondent to identify the documents that it asserts would be protected by the attorney-client privilege and/or work product privilege even under the legal standards and findings that I set forth in the first, second, and third interim reports.

A. OBSERVATIONS BASED ON IN CAMERA REVIEW

Many of the documents covered by this report are communications from, to, or shared with, IRI Consultants (IRI) regarding Project Vivian – the Respondent's campaign to discourage employees from unionizing. The Respondent claims that both

[1] Request 13 seeks "All documents relating to or concerning Google's consideration of and/or implementation of Project Vivian. Request 14 seeks "All documents related to Google's decision to retain IRI Consultants."

[2] In the privilege log, the Respondent also lists "Berbiglia" among the privileges asserted. This is not a third type of privilege, but a reference to a Board decision concerning the parameters of the attorney-client privilege in the context of contract negotiations. See *Berbiglia Inc.*, 233 NLRB 1476, 1495 (1977).

[3] The Intervenors did not challenge the privilege assertions with respect to some items within these ranges, and those items are not subject to *in camera* inspection and were not provided to me.

the attorney-client privilege and the attorney work product privilege apply to these documents. As the party asserting the privileges, the Respondent bears the burden of proving that those privileges apply. See, e.g., *Public Service Co. of New Mexico*, 364 NLRB No. 86, slip op. at 3 (2016) (work product); *U.S. v. Ruehle*, 583 F.3d 600, 607-608 (9th Cir. 2009) (attorney-client); *In re Sealed Case*, 737 F.2d 94, 99 (D.C. Cir. 1984) (attorney-client). With respect to the communications that included IRI, the Respondent has not met the burden with respect to either privilege asserted. I note at the outset that the Respondent does not claim that IRI gave the Respondent legal advice. Moreover, the documents confirm that IRI did not give legal advice, but rather was retained to provide antiunion messaging and message amplification strategies tailored to the Respondent's workforce and the news and social media environment.[4] Such campaign communications are generally not protected by the attorney-client privilege even when they occur between a company and its attorney because they do not seek or provide professional legal advice, but rather provide campaign messaging advice. See *Humphreys, Hutcheson & Moseley v. Donovan*, 568 F.Supp. 161, 175 (M.D. Tenn. 1983) (privilege was not applicable to communications between attorney and company where attorney acted as a labor consultant to persuade the company's employees to reject the union, rather than as a lawyer), affd. 755 F.2d 1211 (6th Cir. 1985); see also *Donovan v. Rose Law Firm*, 1984 WL 49058 (E.D.Ark. 1984) (same), reversed on other grounds 768 F.2d 964 (8th Cir. 1985). Not only were these communications not shown to be seeking or providing legal advice, but they were not confidential communications between the company and its legal advisor – rather they were communications in which IRI – a 3rd party outside the confidential client-lawyer relationship – participated. A communication is not confidential for purposes of satisfying the requirements for application of the attorney-client privilege where the communication was, as here, made in the presence of a 3rd party who is not the agent of either the attorney or the client. *Burlington Industries v. Exxon Corp*., 65 F.R.D. 26, 37 (D.Md. 1974). While communications with IRI are not privileged, any communications in which the Respondent seeks or obtains professional legal advice from its attorneys about retaining IRI, or about IRI's proposals on a confidential basis (meaning, inter alia, that IRI is not a party to the communication), are subject to the attorney-client privilege and the Respondent's assertion of privilege is upheld with respect to the relevant portions of such confidential communications. See, e.g., V5-0001, V5-0002, and V5-1341.

[4] This was evident from the documents reviewed in the first interim report, as discussed there. The documents inspected for the instant report further demonstrate that IRI gave campaign messaging, not legal, advice. For example, in V5-0190, Michael Pfyl – attorney and Director of Employment Law – describes Project Vivian as "the initiative to engage employees more positively and convince them that unions suck." According to the document recommending the retention of a consultant, the purpose of the consultant would be to: "[H]elp us understand the current sentiment around labor organizing/unionization efforts at Google; map out the current stakeholders, risk areas, and efforts; and work with Google stakeholders to create and activate a proactive strategy for positive employee engagement, education and response. We are also looking for guidance on how to engage our executives, leaders, managers and Googlers appropriately, arm them with the right information and facts, and be able to proactively engage on these matters." V5-1348. See also V5-0109 (portion in which Danielle Brown – non-attorney and Vice President of Employee Engagement – describes Project Vivian).

The Respondent contends that attorney-client and work product privileges extend to the IRI materials because IRI staff were experts retained by a lawyer to conduct studies and analyses required to give legal advice. This argument for extending the privilege to 3rd party communications with IRI is not persuasive. First, the IRI material is not on its face, and has not been shown to be, of a type that the Respondent's lawyers required in order to give legal advice. Indeed, the documents in which the Respondent discusses the retention of IRI make no mention of a consultant helping provide legal advice, but rather state that the consultant will give the Respondent messaging advice for its response to the union campaign. See supra footnote 4. Second, the documents reflect that the decision to hire IRI was not made by lawyers, but by a group composed primarily of non-attorneys -- Kara Silverstein (Human Resources Director) and Danielle Brown (Vice President, Employee Engagement) – as well as attorney Christina Latta.[5] V5-0082. The Respondent did make the decision to have IRI report to the Respondent through Latta, and some of the documents express the belief or the hope that this reporting arrangement will cloak IRI's work in privilege. V5-109. However, the communications regarding this do not discuss any professional legal advice that Latta, or other in-house attorneys, require IRI's assistance in order to provide. Indeed, although Latta is an in-house attorney and sometimes gave legal advice, in the documents I have reviewed she is far more frequently giving public relations and communications assistance. For example, in one instance a proposal is discussed to have Latta find a "respected voice to publish an OpEd outlining what a unionized tech workplace would look like, and counselling employees of FB, MSFT, Amazon and google not to do it." Silverstein (Human Resources Director) tells Latta that she "like[s] this idea," but that it should be done so that there "would be no fingerprints and not google specific," and eventually IRI provides a proposed draft of the OpEd to Latta. V5-0132; see also V5-0135, V5-0166, V5-0170, V5-0171. Under the circumstances present here,[6] the Respondent's assertion that the IRI materials are privileged because they were shared with legal counsel runs up against the principle that a party cannot cloak business communications in privilege simply by sending a "cc" to legal counsel or otherwise involving legal counsel in such communications. *Minebea Co. v. Papst*, 228 F.R.D. 13, 21 (D.D.C. 2005), quoting *USPS v. Phelps Dodge Refining*, 852 F. Supp. 156, 163-164 (E.D.N.Y. 1994); see also *Sunland Construction Co.*, 311 NLRB 685, 699–700 (1993) (client "may not refuse to disclose any relevant fact within his

[5] I accept the Respondent's representations about which individuals are attorneys and which individuals are non-attorneys, as well as about the titles of individuals. Those representations were reflected in an attachment to an email dated October 29, 2021, from Ankush Dhupar of the Paul Hastings law firm to counsel for the parties and myself.

[6] As Judge Laws previously ruled, communications with in-house counsel are not presumptively privileged, but rather are cloaked in privilege only if the company makes a "clear showing that the in-house attorney participated in a professional legal capacity" rather than primarily for a business purpose. ALJ August 25, 2021 Order; see also *U.S. v. Chevron Texaco Corp.*, 241 F.Supp.2d 1065, 1076 (N.D.Cal. 2002); see also *Lindley v. Life Investors Ins. Co. of America*, 267 F.R.D. 382, 392 fn. 11 (N.D.Okla. 2010) (communications from in-house attorney are not protected by the privilege when the attorney "is acting as a business negotiator, general business agent, preparer of tax returns, lobbyist, public relations strategist, or press agent") and *Humphreys, Hutcheson & Moseley v. Donovan*, 568 F. Supp. 161, 175 (M.D. Tenn. 1983) (privilege not applicable where attorney acted as a labor consultant rather than as a lawyer), affd. 755 F.2d 1211 (6th Cir. 1985).

knowledge merely because he incorporated a statement of such fact into his communication to his attorney") quoting *Upjohn Corp. v. U.S.*, 449 U.S. 383, 396–397 (1981); *Burlington Industries v. Exxon Corp*., 65 F.R.D. 26, 39 (D.Md. 1974).

With respect to every one of the documents that the Respondent identified in the privilege log as responsive to the Intervenor's IRI/Project Vivian subpoena, the Respondent asserts not only attorney-client privilege, but also attorney work product privilege. This broad assertion is, to put it charitably, an overreach. In order for the work product privilege to apply, the Respondent must show (1) that the prospect of litigation is not a mere contingency, but rather that there is an articulable claim likely to lead to litigation, and (2) that the document was prepared or obtained *because* of that anticipated litigation. *Central Telephone Company of Texas*, 343 NLRB 987, 988 (2004); *United States v. Adlman*, 134 F.3d 1194, 1202-1203 (2d Cir. 1998); *Binks Mfg. Co. v. National Presto Industries*, 709 F.2d 1109, 1119 (7th Cir. 1983). The Respondent has not shown either of those things with respect to a single one of the communications with IRI covered by this report. As the Intervenors note, "To date no request for representation or for a representation election has occurred so the timing of the 'threat' of a non-adversarial representation case proceeding before the NLRB was remote indeed." Intervenor's Position Statement at Page 10, Footnote 5. Even assuming that a non-adversarial proceeding for a representation election could be considered "litigation" for purposes of the work product privilege, the Respondent has not shown that such a proceeding was "more than a mere contingency" or that the campaign messaging advice was created because of that contingency, rather than simply to help the Respondent convince employees that they should not unionize. The Respondent cannot spin the mere fact of a nascent organizing effort among employees into "litigation" – like straw spun into gold – that entitles it to cloak in privilege every aspect of its antiunion campaign.[7]

In addition, numerous documents that the Respondent identifies in its privilege log as being communications between the client and counsel for purposes of legal advice were, in fact, communications between non-lawyers, with attorneys included, if at all, only as "cc'd" recipients, and without any statement seeking legal advice. For example, V5-0107, contains an email from Silverstein (non-attorney, Human Resources Director) to Brown (non-attorney, Vice-President of Employee Engagement) discussing employee opposition to mandatory arbitration. Attorney Lambert and non-attorney Eileen Naughton were "cc'd," but no request for legal advice is stated in the communication. There are numerous similar examples among the documents that the Respondent seeks to withhold. See, e.g., V5-0029, V5-0030,V5-0037, V5-0053,[8] V5-0076, V5-0102. As discussed earlier, a company cannot cloak a document in privilege merely by providing a copy to counsel. See *Sunland Construction*, supra, *Burlington*

[7] For these reasons, and as discussed in the first interim report, the instant case is readily distinguishable from *BP Exploration, Inc.*, 337 NLRB 887 (2002), the case upon which the Respondent primarily relies to support the proposition that communications to an attorney by a 3rd party outside the attorney-client relationship are still privileged.

[8] Item V5-0053 includes a request to Latta for advice, but advice regarding communications/public relations, not professional legal advice.

Industries, supra. Moreover, communications directed simultaneously to both attorneys and non-attorneys are generally not considered confidential communications seeking professional legal advice. *In re Vioxx Prods. Liability Litigation*, 501 F.Supp. 2d 789, 805-807 (E.D. La. 2007).

With respect to a number of the documents, any attorney-client privilege that might arguably have existed was waived because the Respondent directed those communications to, received them from, or shared them with, IRI – a 3rd party outside the confidential relationship. See *U.S. v. Evans*, 113 F.3d 1457, 1462 (7th Cir. 1997) (Disclosing a privileged communication to a 3rd party, or staff member who is not acting as an agent of either the client or the client's attorney, generally waives the privilege.); *In re Vioxx Prods. Liability Litigation*, 501 F.Supp. 2d 789, 805-807 (E.D. La. 2007) (when the clients communications are simultaneously sent to both lawyers and non-lawyers, it usually cannot claim that the primary purpose was for legal advice). Documents with respect to which the Respondent has, by including a 3rd party in the communication, waived any attorney-client privilege that arguably existed include: V5-0103, V5-0130, V5-0136, V5-0139, V5-0142, V5-0143, V5-0144, V5-0145, V5- 0147, V5-0148, V5-0149, V5-0150, V5-0152, V5-0153, V5-0154, V5- 0157, V5-0158, V5-0170, V5-0171, V5-0174, V5-0177.

As with documents discussed in the first interim report, the Respondent has not met its burden of establishing privilege with respect to a number of documents addressed in this report because those documents merely set forth, or schedule, steps in the process of developing and implementing the antiunion campaign, but do not convey the substance of any confidential communications engaged in to seek or provide legal advice or prepare for litigation. Documents merely showing that an attorney-client meeting or communication took place regarding a general subject matter are not, without more, privileged. *Humphreys, Hutcheson & Moseley v. Donovan*, 755 F.2d 1211, 1219 (6th Cir. 1985); *Robinson v. Wells Fargo Bank, N.A.*, 2018 WL 1202826, *4 (S.D. Ohio March 7, 2018); *Davine v. Golub Corp.*, 2017 WL 517749, *5 (D. Mass. Feb. 8, 2017); see also *Dawson v. New York Life Ins. Co.,* 901 F.Supp. 1362, 1367 (N.D.Ill.1995) ("[T]here is a difference between merely providing legal information and providing legal 'advice'."). Some examples of documents that fall into this category, in addition to any other categories that preclude a finding of privilege, include: V5-0004, V5-0005, V5-0006, V5-0018, V5-0019, V5-0027, V5-0028, V5-0041, V5-0067, V5-0068, V5-0069, V5-0082, V5-0086, 0087, 0088, 0089, 0090, 0096, 0097, 0098, 0099, 0100, 0101, 0114, V5-0120, V5-0128, V5-0130, V5-0134, V5-0136, V5-0141, V5-0142, V5-0143, V5-0144, V5-0145 to V5-150, V5-0156, V5-0157, V5-0164, V5-0165, V5-0172, V5-0173, V5-0175, V5-0176, V5-0179, V5-0181, V5-0193, V5-0194.

Finally, I note that my review showed that the Respondent produced a number of documents to me for *in camera* inspection with large portions already, it appears, redacted. See, e.g., V5-0158, V5-0163, 0168. Since the Respondent did not provide

these portions to me for inspection, I cannot find that it has met its burden of establishing that the redacted portions are covered by the attorney-client privilege or work product privilege.

C. RULINGS REGARDING INDIVIDUAL DOCUMENTS

At this time I make the following rulings with respect to the contested assertions of privilege for items in the V5-0001 to V5-0200 range. These are my final rulings regarding those documents.

1. The Respondent's assertions of attorney-client privilege are sustained with respect to the documents identified in the privilege log as numbers: V5-0014, V5-0015, V5-0016, V5-0017, V5-0020, V5-0022, V5-0023, V5-0035, V5-0106, V5-0116, V5-0117, V5-0125, V5-0127, V5-0155, V5-0160, V5-0186, V5-0187, V5-0195, V5-0197, V5-0198.[9]

2. The Respondent's assertions of privilege are sustained with respect to: the portion of item V5-0001 beginning with "Me/our" and ending with "work here?" and the portion of V5-0002 on the bottom of page 1 beginning with "I just wanted" and ending with "and comms." Those portions may be redacted before the documents are provided to the Intervenors pursuant to the subpoena, but the assertion of privilege has not been substantiated with respect to the remainder of those documents, which I order the Respondent to provide to the Intervenors immediately.

3. For one or more of the reasons discussed in this report, the first interim report and/or the second interim report, the Respondent has not met its burden with respect to the assertions of attorney-client and/or work product privilege regarding the remainder of the contested documents identified by the privilege log in the V5-0001 to V5-0200 range. I order the Respondent to immediately provide those documents to the Intervenors pursuant to the subpoena.

SO ORDERED.

IT IS FURTHER ORDERED that, within 14 days from the date of this Order, the Respondent is to file a submission setting forth which of the disputed documents identified in the privilege log as items V5-0201 through V5-1274 the Respondent contends are protected by the attorney-client privilege and/or work product privilege apply even under the legal standards and findings that are set forth in the interim reports regarding the other documents submitted for *in camera* inspection. Those standards and findings include the legal standards controlling how in-house counsel is

[9] Since I find that these items are shielded from disclosure by the attorney-client privilege, I do not reach the question of whether they are also shielded by the work product privilege. The Respondent did not establish the applicability of the work product privilege with respect to any of the documents that were not otherwise shielded by the attorney-client privilege.

treated for purposes of evaluating assertions of privilege, and my finding that IRI was a 3rd party outside the attorney-client relationship that provided antiunion messaging and message amplification advice, not expertise necessary for the provision of professional legal advice.

Issued at Washington, District of Columbia this 7th day of January 2022.

PAUL BOGAS
Administrative Law Judge