

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA**

SHIRLEY SLOCUM, ET AL.

CIVIL ACTION

VERSUS

NO. 16-12563

INTERNATIONAL PAPER COMPANY, ET AL.

DERRICK SANDERS, ET AL.

NO. 16-12567

VERSUS

INTERNATIONAL PAPER COMPANY, ET AL.

BRENT JARRELL, ET AL.

NO. 16-13793

VERSUS

INTERNATIONAL PAPER COMPANY, ET AL.

SECTION "L" (1)

ORDER AND REASONS

Before the Court for expedited hearing is Plaintiffs' Motion for In Camera Inspection of Trial Exhibit, R. Doc. 335.¹ In response, Defendant filed a motion to enforce the Court's protective order, R. Doc. 345, and an opposition, R. Doc. 346. Having considered the parties' arguments and the relevant law, the Court now rules as follows.

I. BACKGROUND

This set of cases arises out of damages allegedly sustained by Plaintiffs due to the discharge of "black liquor" at the Bogalusa Paper Mill on June 10, 2015. R. Doc. 1-2 at 1. Plaintiffs assert claims against Defendant, International Paper Company ("IP"). Plaintiffs' theories of liability

¹ Identical motions have been filed in the consolidated cases, *Sanders v. International Paper*, No. 16- 12567, and *Jarrell v. International Paper*, No. 16-12793. For the sake of simplicity, this Order & Reasons only cites the record in *Slocum v. International Paper*, No. 16-12563

sound in negligence, strict liability, and nuisance. R. Doc. 1-2 at 21.

Black liquor is a by-product of the paper making process. Black liquor is typically recycled in evaporator tanks for repeated use in the pulping process. R. Doc. 1-2 at 3. On June 10, 2015, the sight glass on an evaporator tank containing black liquor ruptured at the Bogalusa Paper Mill, which resulted in a stream of black liquor erupting several feet into the air and dispersing into the atmosphere. R. Doc. 1-2 at 14. The next day, Defendants advised the media that there was a “slight leak” in a process unit that led to the dispersal of diluted black liquor, but that Defendants were “confident that there is no risk to human health or the environment.” R. Doc. 1-2 at 14.

Plaintiffs disagree. Plaintiffs contend that the dispersal of black liquor caused personal injury, property damage and/or emotional distress, and argue Defendants are liable for Plaintiffs’ damages. R. Doc. 1-2 at 16. For example, the Welch Plaintiffs claim the dispersal caused a black mist to descend on their house, and that the mist stuck the exposed skin of themselves and their children. R. Doc. 1-2 at 18. For a few days after, the Welches “experienced itchy, burning, watery eyes, [and] headaches with throat and upper respiratory irritation.” R. Doc. 1-2 at 18. The Welches concede that their physical symptoms cleared “in a short period of time,” but argue they continue to suffer emotional distress and fear about a reoccurrence of the event. R. Doc. 1-2 at 18. Other Plaintiffs claim similar damages.

A discovery dispute has arisen regarding IP’s assertion of attorney-client privilege related to certain internal corporate communications involving the public relations team and in-house counsel. Specifically, Plaintiffs seek an evidentiary ruling on an email chain containing a draft press release to be issued in response to the explosion at Defendant’s Bogalusa mill. An email was initially sent four hours after the Release Event from the mill’s Communications Manager to IP’s Chief Communications Leader and IP’s Director of Global Media Relations, as well as two

members of IP's in-house counsel. R. Doc. 280 at 1-2. IP's Chief Communications Leader responded suggesting edits to the media statement, to which General Counsel replied "Look good." *Id.* at 5.

II. PRESENT MOTIONS

a. Plaintiffs' Motion for In Camera Inspection of Trial Exhibit [R. Doc. 260]

Plaintiffs now move for *in camera* inspection of a two-page email chain addressing a press release prepared by a member of IP's public relations department, on which in-house counsel was copied and provided approval. R. Doc. 260. Plaintiffs seek to use the emails, inadvertently produced by IP, for evidentiary purposes at depositions or the upcoming trial. Applying the substantive guidelines set forth in *In re Vioxx Prods. Liab. Litig.*, Plaintiffs assert that IP's claim of attorney client privilege is not legitimate because the email does not contain any identifiable legal issue. Instead, Plaintiff contends IP merely copied counsel for informational and business advisory purposes. R. Doc 260-1 at 5, 8-9. Plaintiffs further aver that IP has failed to describe the documents with specificity under Rule 26(b)(5) on the Privilege Log and that in doing so, Defendant has waived privilege for thirty-five related documents. *Id.* at 11, 12.

i. Defendant's Opposition [R. Doc. 280]

In opposition, IP maintains that email at issue sought legal advice from in-house counsel regarding the legal implications of a proposed course of conduct—IP's press release in response to the Release Event. R. Doc. 280 at 3. IP further argues the e-mail's subject line caption "PRIVILEGED ATTY CLIENT INFORMATION" attests to this claim. Additionally, IP argues the fact that the email does not contain any explicit request for "egal advice is not dispositive and rather, that the request for legal advice here is implicit. *Id.* at 5. Furthermore, IP claims that general

counsel's response that the Communication Manager's draft and the Chief Communications Leader's edits "look good" constitutes legal advice. *Id.*

In response to Plaintiffs' argument that the privilege log is not sufficiently descriptive, IP points out that it has supplied the author, recipient, date and "general" nature of the documents. *Id.* at 7. IP argues that the Privilege Log entries regarding the emails at issue, which state the authors and recipients of the e-mails "for purposes of seeking legal advice related to media statement as to the June 10, 2015 release event," are representative of their detailed descriptions provided in the log. *Id.*

III. LAW & ANALYSIS

a. Basics of the Attorney-Client Privilege

The attorney-client privilege is an exception to the general rule that the law is entitled to every man's evidence. The privilege generally protects communications from the client to the attorney, and responsive communications from the attorney to the client. A widely quoted definition of the attorney-client privilege appears in *United States v. United Shoe Machinery Corp.*, 89 F. Supp. 357, 358–59 (D. Mass. 1950):

The privilege applies only if (1) the asserted holder of the privilege is or sought to become a client; (2) the person to whom the communication was made (a) is a member of the bar of a court, or his subordinate and (b) in connection with this communication is acting as a lawyer; (3) the communication relates to a fact of which the attorney was informed (a) by his client (b) without the presence of strangers (c) for the purpose of securing primarily either (i) an opinion on law or (ii) legal services or (iii) assistance in some legal proceeding, and not (d) for the purpose of committing a crime or tort; and (4) the privilege has been (a) claimed and (b) not waived by the client.

89 F. Supp. at 358–59. This definition was adopted by the Fifth Circuit Court of Appeals in 1975 in *In re Grand Jury Proceedings*, 517 F.2d 666, 670 (5th Cir. 1975). Five elements are common to all definitions of the attorney-client privilege: (1) an attorney, (2) a client, (3) a communication,

(4) confidentiality anticipated and preserved, and (5) legal advice or assistance being the purpose of the communication. *In re Vioxx Prod. Liab. Litig.*, 501 F. Supp. 2d 789, 795 (E.D. La. 2007). Because the attorney-client privilege has the effect of withholding relevant information from the fact-finder, it is interpreted narrowly so as to apply only where necessary to achieve its purpose. *Equal Emp. Opportunity Comm'n v. BDO USA, L.L.P.*, 876 F.3d 690, 695 (5th Cir. 2017) (internal quotations omitted).

It is well-accepted, of course, that the attorney-client privilege applies to corporations. *See Upjohn Co. v. United States*, 449 U.S. 383 (1981); *Garner v. Wolfenbarger*, 430 F.2d 1093 (5th Cir. 1970). The fictitious legal entity is the client that cannot speak, but that entity is personified by the employees who represent its interests and speak on its behalf. Consequently, it protects communications between those employees and corporate legal counsel on matters within the scope of their corporate responsibilities, as well as communications between corporate employees in which prior advice received is being transmitted to those who have a need to know in the scope of their corporate responsibilities.²

b. Legal Purpose Must be the Primary Purpose

In order for attorney-client privilege to apply, legal advice must be the primary purpose of the communication. *In re Vioxx Prods. Liab. Litig.*, 501 F. Supp. 2d 789, 797 (E.D. La. 2007); *see also Hercules Inc. v. Exxon Corp.*, 434 F.Supp. 136, 147 (D.Del.1977). (“Only if the attorney is acting as a lawyer-giving advice with respect to the legal implications of a proposed course of conduct-may the privilege be properly invoked.”) The tasks of discerning whether legal advice is being sought in a given exchange is particularly difficult when dealing with internal corporate communications and in-house counsel. This is largely due to the fact that “modern corporate

² *See generally* PAUL R. RICE, 1 ATTORNEY-CLIENT PRIVILEGE IN THE UNITED STATES, §§ 4:11-14 (Thomson West 2d ed.1999).

counsel have become involved in all facets of the enterprises for which they work.” *Id.* “As a consequence, in-house legal counsel participates in and renders decisions about business, technical, scientific, public relations, and advertising issues, as well as purely legal issues.” Additionally, “this problem of determining the type of services being rendered by in-house counsel has been exacerbated by the advent of e-mail that has made it so convenient to copy legal counsel on every communication that might be seen as having some legal significance at some time, regardless of whether it is ripe for legal analysis.”

In the present case, the communication at issue is an email chain containing a draft press release to be issued in response to the explosion at Defendant’s Bogalusa mill. An email was initially sent four hours after the Release Event from the mill’s Communications Manager to IP’s Chief Communications Leader and IP’s Director of Global Media Relations, as well as two members of IP’s in-house counsel. R. Doc. 280 at 1-2. IP’s Chief Communications Leader responded suggesting edits to the media statement, to which General Counsel replied, “Look good.” *Id.* at 5.

When a corporation simultaneously sends communications to both lawyers and non-lawyers, as is the case here, “it usually cannot claim that the primary purpose of the communication was for legal advice or assistance because the communication served both business and legal purposes.” *In re Vioxx*, 501 F. Supp. 2d at 805; *see also United States v. Chevron Corp.*, 1996 WL 444597 (N.D. Cal. 1996) (“When a document is prepared for simultaneous review by non-legal as well as legal personnel, it is not considered to have been prepared primarily to seek legal advice and the attorney-client privilege does not apply.”); *United States v. International Business Machines Corp.*, 66 F.R.D. 206, 213 (S.D.N.Y.1974) (“If the document was prepared for purposes

of simultaneous review by legal and non-legal personnel, it cannot be said that the primary purpose of the document is to secure legal advice.”).

In view of this standard, Defendant’s request for privilege over the email chain related to the draft press release is rejected. IP has not met the burden of demonstrating that the primary purpose of this email was to secure an opinion on a specified legal issue or to examine a legal instrument. Rather, in-house counsel merely participated in a decision regarding public relations, and therefore business more generally. The email was addressed to both lawyers and non-lawyers for review, comment, and approval, which supports a finding that the primary purpose of such communications was not to obtain legal assistance since the same was being sought from all. *In re Vioxx Prod. Liab. Litig.*, 501 F. Supp. 2d 789, 809 (E.D. La. 2007) Furthermore, no particular legal issue is identified in the exchange, nor does the content of counsel’s reply signing off on the proposed public relations announcement constitute providing legal advice. The exchange is consistent with the general practice of copying legal counsel on all communications which may, at some time, be of legal significance. Accordingly, the documents do not satisfy the requirements for attorney-client privilege.

c. Privilege Log

A privilege log must “describe the nature of the documents, communications, or tangible things not produced or disclosed – and do so in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the claim.” Fed. R. Civ. P. 26(b)(5)(A)(ii). The test for assessing the adequacy of a privilege log is whether the privilege log’s description of each document and its contents “provide sufficient information to permit courts and other parties to test the merits of the privilege claim.” *EEOC v. BDO USA, L.L.P.*, 876 F.3d 690, 697 (5th Cir. 2017). The party claiming privilege bears the burden of proof, and therefore the

descriptive portion of the log may not may “conclusory invocations of the privilege or work-product rule.” *Chemtech Royalty Assocs., L.P. v. U.S.*, 2009 U.S. Dist. LEXIS 27696, at *7 (M.D. La. March 30, 2009). Privilege log entries which simply state that documents or correspondence concerns legal advice lack sufficient information for the court or other parties to determine the applicability of the privilege.” *Id.* (citing *United Investors Life Insurance Company v. Nationwide Life insurance Company*, 233 F.R.D.(N.D. MS 2006)).

Here, IP’s privilege log contains a total of 36 documents for which it asserts attorney-client privilege. R. Doc. 269-5. Each of these log entries lists the participants and/or recipients in the correspondence along with the broad description “for the purposes of seeking legal advice.” *Id.* Defendants’ descriptions give no factual basis for determining the application of privilege from the log alone. The repeated descriptions stating “for the purposes of seeking legal advice” are merely conclusory and thus fail to satisfy the standard of Rule 26(b) in this context, given the complex role of in-house counsel discussed above. Accordingly, IP must produce the 35 remaining documents for which IP asserts attorney-client privilege to the Court for *in camera* review in anticipation of the upcoming bench trial.

IV. CONCLUSION

IT IS ORDERED that the Plaintiffs’ Motion for in camera review, R. Doc. 335, is **GRANTED**. The Court finds these communications to be outside the scope of attorney-client privilege and orders their immediate production.

IT IS FURTHER ORDERED that IP produce the 35 remaining documents withheld on the basis of attorney-client client privilege for the Court’s *in camera* review within 7 days of this Order.

IT IS ALSO ORDERED that IP's Motion to Enforce the Protective Order, R. Doc. 345, as to the emails discussed herein³ is hereby **DENIED**.

New Orleans, Louisiana, this 28th day of June, 2021.


UNITED STATES DISTRICT JUDGE

³ Bates-labeled IP.SL006968 and IP.SL006969.