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September 9, 2022

In the Matter of

LEACHCO, INC., CPSC Docket No. 22-1

Respondent.

ORDER PROVIDING GUIDANCE FOR PRIVILEGE LOGS

The parties participated in a Discovery Conference on September 7, 2022. The conference ended with an understanding of this Court's expectations for counsel behavior during discovery, and a return to attempted resolution of the discovery issues raised in previous motions[1] based on this Court's guidance and this Order. This Order provides guidance regarding the adequacy of privilege logs to assist the parties

I. Production Logs Should Provide Sufficient Party Identification and Substantive Description to Enable the Requesting Party and Court to Evaluate the Claim.

A. Rule and Persuasive Case Law

The Commission requires that responses to discovery requests "state, with respect to each item or category requested, that inspection and related activities will be permitted as requested, unless the request is objected to, in which event the *reasons for objection shall be stated*." 16 C.F.R. § 1025.33(c) (emphasis added).

Per the Federal Rules of Civil procedure, privilege logs must, for each entry, include the following:

> (i) expressly make the claims; and (ii) describe the nature of the documents, communications, or tangible things not produced or disclosed—and do so in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the claims.

Fed. R. Civ. P. 26(b)(5)(A). Parties should provide sufficient information to enable the requesting party and the court to evaluate the applicability of the claimed privilege. Fed. R. Civ. P. 26 advisory committee's note to 1993 Amendment. Further, if the disclosing party objects to

[1] Compl. Counsel's Mot. to Compel Disc. (Aug. 10, 2022); Leachco, Inc.'s Objs. to Notices of Depo. (Aug. 11, 2022); Leachco, Inc.'s Mot. to Compel Disc. (Aug. 19, 2022).

the covered time-period of a request, it should still produce the non-privileged materials for the non-objected-to period and describe those withheld. *Id.* The notice should be sufficiently detailed to "understand the basis for the claim and to determine whether waiver has occurred." Fed. R. Civ. P. 26 advisory committee's note to 2006 Amendment.[2]

Circuit Court decisions demonstrate that more than just recitation of the privilege is required. *See United States v. Fluitt*, No. 22-30316, 2022 WL 3098734, at *2 (5th Cir. Aug. 4, 2022) (noting that such basic notations as "attorney-client communication" or 'attorney work product" with no further explanation fail to provide sufficient information to understand the nature of the claim); *In re Grand Jury Investigation*, 974 F.2d 1068, 1071 (9th Cir. 1992) (citing *Dole v. Milonas*, 889 F.2d 885, 888 n.3 (9th Cir. 1989)) (finding the following adequate: attorney and client involved; nature of the document; all persons or entities shown on the document to have received or sent it; all persons or entities known to have been furnished it or informed of its substance; the date generated or prepared; and *information on the subject matter of each document*) (emphasis added).

Regarding author and recipient information, courts have tended to require more than just names. *See generally Spilker v. Medtronic, Inc.*, No. 4:13-CV-76-H, 2015 WL 1643258 (E.D.N.C. Apr. 13, 2015) (finding it adequate that disclosing party provided a supplemental log, including a glossary of names and titles associated with the documents); *Muro v. Target Corp.*, 250 F.R.D. 350 (N.D. Ill. 2007) (stating that the requesting party could not assess whether the entry was within the sphere of attorney-client privilege without access to the identities and job descriptions of the associated persons).

Courts also require more specific substantive descriptions to enable evaluation of the privilege. *See generally Johnson v. Ford Motor Co.*, No. 3:13-CV-06529, 2016 WL 1241538 (S.D. W. Va. Mar. 28, 2016) (finding it adequate that the entry provided specific type of data analyzed by the safety office in each document). One court provided examples of adequate explanations [bulleted]:

- Memo from outside counsel providing meeting minutes on [the product].
- Attachment transmitted from client to client and independent consultant that is the Attorney-Client Privilege subject of a request for legal advice regarding an adverse event.

[2] The Commission's Procedural Rules at 16 C.F.R. Part 1025, and not the Federal Rules of Civil Procedure, govern discovery in this matter. *See* 16 C.F.R. § 1025.31(c)(2) ("Discovery may be denied or limited . . . to preserve the privilege of a witness, person, or governmental agency as governed by the Constitution, any applicable Act of Congress, or the principles of the common law as they may be interpreted by the Commission in light of reason and experience."); *id.* § 1025.31(i) ("The use of these discovery procedures is subject to the control of the Presiding Officer, who may issue any just and appropriate order for the purpose of ensuring their timely completion."). Nevertheless, the Federal Rules may be helpful when the Commission's rules do not fully address a subject, and I will rely on them for guidance when it is prudent or necessary to do so, and when their application is not inconsistent with the CPSC's rules or any provision of its organic statutes.

- Portion of email requesting and reflecting legal advice of [counsels], regarding sales communications provided to employees who need the information to perform their job functions.
- Privileged and confidential Attorney Memo regarding risk-benefit assessment issues related to [product].

Phillips v. C.R. Bard, Inc., 290 F.R.D. 615, 642–43 (D. Nev. 2013). Judges have also issued pretrial orders requiring the following:

> (1) "Custodial Source, To, From, Carbon Copy, Date, reason for privilege or immunity and a description sufficient to meet the requirement of Rule 26"; (2) "the production date of the document, or the production wave associated with the document"; and (3) identification of "[i]ndividuals who are In-House Counsel or Outside Counsel of record," including 'the name of the law firm or entity employing such Counsel."

In re 3M Combat Arms Earplug Prods. Liability Litig., No. 3:19-md-2885, 2020 WL 1321522 (N.D. Fla. Mar. 20, 2020).

Finally, courts have found inadequate the following. First, a "conclusory assertion that a document is privileged." *Johnson v. Ford Motor Co.*, 309 F.R.D. 226, 232 (S.D. W. Va. 2015) (citing *United Stationers Supply Co. v. King*, No. 5:11-CV-00728, 2013 WL 419346, at *2 (E.D.N.C. Feb. 1, 2013)). Second, "vague and uninformative document descriptions." Id. at 233 (citing *In re McDonald*, No. 13-10661, 2014 WL 4365362, at *4 (Bankr. M.D.N.C. Sept. 3, 2014)). Finally, boilerplate objections "disclos[ing] little or no information about actual contents of the documents so that the plaintiff was completely unable to determine which documents had been withheld." *Williams v. Taser Int'l, Inc.*, 274 F.R.D. 694 (N.D. Ga. 2008); *see also McMorrow v. Mondelez Int'l, Inc.*, No. 17-cv-02327-BAS (JLB), 2019 WL 3852498 (S.D. Cal. 2019).

B. Guidance

Consistent with the holdings of other courts that have considered the matter, this Court requires more than just boilerplate recitations of privilege without any substantive identification of the material or persons involved by which the requesting party or the court may evaluate the claim. Some deficiencies may be rather easily cured. Using as an exemplar Complaint Counsel's privilege log, a glossary of persons or entities that could assist in discerning when parties and counsel, or Commissioners and subordinate staff, are involved in potentially privileged communications, would be more efficient than, and equivalent to, a wholesale reconstruction of the provided log. This is only one possible method, but the disclosing party should thoroughly identify the positions and author/recipient relationships for each claim.

Substantively, the disclosing party should provide a sufficiently detailed description of the communication or document over which privilege is claimed. Such description should, while

not revealing privileged information, demonstrate a *prima facie* case[3] for the privilege asserted. *See In re Grand Jury Investigation*, 974 F.2d 1068, 1075 (9th Cir. 1992). It is possible that simply including the subject line of the email, redacted if the subject line itself contains privileged information, may satisfy this requirement.

This Court directs provision of the following information, subject to the guidance above, for an adequate privilege log:

- Date
- Full name, title, capacity of the author and recipients
- Relationship between the author and recipients (if not apparent from the circumstances—i.e., not a clear relationship between parties or discernible from known facts)
- Description of the subject matter with information sufficient to demonstrate the existence of the privilege
    - Description must convey more than the blanket and circular reference to the elements of the deliberative process privilege.
    - The disclosing party may state the subject of the email. Or it may state more specifically why the email's contents fall within the privilege by stating the general subject matter of the email without breaching or waiving the privilege—e.g., "Staff attorney answer to member query about [subject]."
- Sufficient information to demonstrate that each element of the asserted privilege is satisfied [*combination of party identification and substantive description*]
- Statement that the privilege has not been waived, if applicable
    - This Court will allow a general disclaimer of waiver and previous disclosure and assertion of retained confidence, plus identification of any documents inadvertently disclosed or incidentally released in other proceedings, along with a more elaborate explanation of why the privilege should nonetheless be deemed preserved.
- Bates numbers of withheld documents, if applicable

II. Parties Should Provide More Detailed Information If Relying on Deliberative Process Privilege Because It Is More Narrow and Specific Than Some Other Recognized Privileges

> Claiming deliberative process privilege requires a showing that:
>
> 1) the documents are 'pre-decisional," i.e., generated antecedent to the adoption of an agency policy, and that 2) the documents are "deliberative" in nature, that is, weighing the pros and cons of an agency's adoption of one viewpoint or another.

Hall v. United States Dep't of Just., Civ. A. No. 87-0474, 1989 WL 24542, at *3 (D.C. Cir. Mar. 8, 1989) (citing *Coastal States Gas Corp. v. Dep't of Energy*, 617 F.2d 854, 866 (D.C. Cir. 1980)). Such privilege does not provide absolute protection. Not all counsel-client

[3] Every privilege is defined by elements. A *prima facie* case need not establish conclusively that a communication is privileged, only that a reasonable person could conclude that it might.

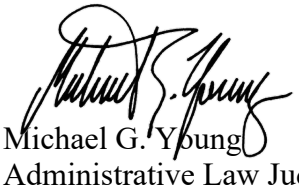
communications are privileged, and work product and deliberate process privileges may not bar discovery if denial of the request is shown to cause undue hardship. *United States v. Miracle Recreation Equip. Co.*, 118 F.R.D. 100, 107 (S.D. Iowa 1987).

An agency, therefore, must describe more because there is no presumption that the communications among agency actors are privileged. Even if they might be, the class is fairly narrow—i.e., pre-decisional, the types of communications that might be used to facilitate agency decision-making. Further, even if it is privileged, the privilege may be abrogated in some circumstances, such as when the requestor cannot acquire the evidence sought by any other means and it is essential to its case. *See Miracle Recreation Equip. Co.,* 118 F.R.D. at 107–08 (Recognizing purpose and limits of deliberative process privilege) *See also* 16 CFR §1025.31.

This Court therefore advises that disclosing parties include sufficient information in their substantive descriptions to demonstrate why this particular privilege—or any other privilege asserted in this litigation—is valid.

III. Conclusion

This guidance has been provided at the request of the parties, who seek to resolve certain discovery matters in dispute. The entrance of new counsel, and the frank discussion of expectations at the September 7 discovery conference, have provided an opportunity for the parties to proceed with a clear understanding of the Court's expectations in such matters. The parties have offered to provide a new timetable for pretrial action, and the Court greatly appreciates their cooperation. Further guidance will be provided at the request of the parties, but in light of recent developments I hold that the parties' prior discovery disputes are hereby **MOOT**, and the parties are directed to move forward with discovery based on the guidance in this Order, according to the pending jointly provided schedule.



Michael G. Young
Administrative Law Judge

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