

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
(Miami Division)

Case No. 1:16-cv-23573-MGC

AH BISCAYNE INVESTOR, LLC,

Plaintiff,

vs.

1st Sun PROPERTIES, LLC,

Defendant.

**PLAINTIFF'S OPPOSITION TO DEFENDANT'S MOTION TO COMPEL
EXPEDITED PRODUCTION OF REDACTED AND WITHHELD DOCUMENTS
[ECF NO. 86], AND CROSS-MOTION TO COMPEL DEFENDANT'S
PRODUCTION OF WITHHELD DOCUMENTS**

Plaintiff AH Biscayne Investor, LLC ("AH Biscayne") files this opposition to the Motion to Compel Expedited Production of Improperly Redacted and Withheld Documents or, in the Alternative, for Appointment of a Special Master to Review Plaintiff AH Biscayne Investor, LLC's Improperly Redacted and Withheld Documents [ECF No. 86] (the "Motion to Compel"), filed by defendant 1st Sun Properties, LLC ("1st Sun"), and this cross-motion to compel 1st Sun to produce certain withheld documents, and in support thereof, states as follows:

Preliminary Statement

By its Motion to Compel, 1st Sun seeks the production of privileged communications between AH Biscayne and its in-house counsel, William Connolly. In its motion, 1st Sun does not provide the Court with any factual basis to challenge AH Biscayne's privilege assertion with respect to the withheld communications. Instead, 1st Sun blanketly challenges AH Biscayne's privilege assertion with respect to *all* communications involving Mr. Connolly. However, the communications contained in these documents are in fact privileged. Indeed, as set forth in Mr. Connolly's affidavit, as in-house counsel, Mr. Connolly provided -- and continues to provide -- AH Biscayne with legal advice concerning the matters at issue in this litigation. Mr. Connolly provided legal advice to AH Biscayne

concerning the negotiation of the relevant agreements; Mr. Connolly provided -- and continues to provide -- legal advice to AH Biscayne concerning the parties' respective obligations under the relevant agreements and the manner in which those agreements relate to the management of the parties' project; and Mr. Connolly provided -- and continues to provide -- legal advice concerning the parties' dispute with respect to the relevant agreements and the resulting litigation.

Accordingly, AH Biscayne reviewed all of the relevant communications involving Mr. Connolly in order to protect its privilege and to ensure that it withheld only those documents containing Mr. Connolly's legal advice or communications made for the purpose of obtaining such advice. As a result, AH Biscayne produced 112 documents containing internal communications with Mr. Connolly that AH Biscayne determined were not privileged. Moreover, as set forth herein, AH Biscayne will withdraw its privilege claim with respect to an additional 40 documents. Accordingly, 1st Sun's Motion is without merit and should be denied.

Moreover, 1st Sun withheld from its own production the very same type of communications that it now seeks to compel from AH Biscayne. Indeed, 1st Sun -- which does not have an in-house counsel -- withheld at least 942 emails between its representatives and outside counsel, with 170 of those emails involving communications between 1st Sun and Dana Friedman, an outside counsel for 1st Sun who provided many of the same legal services that Mr. Connolly provides for AH Biscayne. 1st Sun cannot invade AH Biscayne's privilege while maintaining its own privilege as to the same types of communications simply because it chooses not to retain an in-house lawyer.¹

Facts

A. Nature Of The Action

This action arises out of a dispute concerning the interpretation of an unambiguous agreement relating to the parties' development of a real estate project. On July 24, 2015, the parties formed a tenancy-in-common to acquire the property underlying the project and to

¹ Moreover, despite not retaining in-house counsel, 1st Sun withheld 38 internal emails containing communications with one of its executives, Pasquale Guliano, who is a licensed attorney, but who is not 1st Sun's in-house counsel and did not act as such with respect to the relevant transactions. Accordingly, AH Biscayne cross-moves to compel the production of those documents.

hold the property for the next year, while the parties prepared the project for construction. The parties' tenancy-in-common agreement (the "TIC Agreement") provided that AH Biscayne owned 94.1% of the project, while 1st Sun owned 5.9%. Contemporaneous with the TIC Agreement, the parties also entered into a side letter agreement (the "First Side Letter"). That agreement requires the parties, upon the occurrence of certain events, to enter into an operating agreement to govern the management and operation of the limited liability company that would own the property as successor in interest to the tenancy-in-common. Pursuant to the clear and unambiguous provisions of the side letter agreement, the parties agreed that AH Biscayne is to control the management and operation of the limited liability company unless 1st Sun obtains at least a 25% interest in the property by July 24, 2016 (in which case, and only in which case, the parties would share control).

As of July 24, 2016, 1st Sun did not own 25% of the property. Accordingly, pursuant to the clear and unambiguous terms of the parties' side letter, 1st Sun must enter into an operating agreement providing for AH Biscayne to control the parties' limited liability company. Notwithstanding, 1st Sun refused to enter into, or even negotiate, an operating agreement that provides for AH Biscayne's control in accordance with the parties' agreement. 1st Sun's refusal to do so constitutes a breach of the parties' side letter agreement (and its fiduciary duty to AH Biscayne as a member of the parties' limited liability company). As a result of 1st Sun's breach of its clear contractual obligation, a loan commitment issued by Ocean Bank expired without the parties having executed the operating agreement needed for Ocean Bank to proceed with the loan, and no other lender will provide the parties with a construction loan absent an executed operating agreement.²

B. Discovery To Date

In the course of discovery, the parties each served requests for production and objections to those requests. After several conferences, the parties agreed upon a protocol for electronic discovery. AH Biscayne has produced approximately 5,700 documents; 1st Sun has produced approximately 5,100 documents.

² Because the parties' obligations under the side letter are clear and unambiguous, and the facts relevant to those obligations are undisputed, AH Biscayne has moved for summary judgment on its claims for breach of contract and a declaratory judgment. [ECF No. 77.]

Moreover, in order to facilitate third-party document productions, the parties agreed upon an order governing production of documents from nonparties Ocean Bank and Greenberg Traurig. [See ECF No. 55.] As part of those agreements, the parties agreed that information concerning individual investors in the parties' LLC organizations could be redacted and withheld from production because they were confidential and not relevant to this dispute. (*Id.*) To that end, when nonparty Ocean Bank produced its documents in response to the parties' subpoenas, it redacted the names of individual investors from its production in consultation with the parties. 1st Sun did not object to any of Ocean Bank's redactions.

C. The Parties' Privilege Logs

AH Biscayne's privilege log contains 2,529 entries. Those entries identify documents that were withheld or redacted because they contain privileged communications between AH Biscayne and its attorneys. Those attorneys include in-house counsel William Connolly and outside counsel who provided legal advice concerning the relevant agreements and this litigation.³

1st Sun's privilege log contains 980 entries. (*See* Exhibit 1.) Those entries identify documents that 1st Sun asserts are privileged. Of the documents withheld by 1st Sun, 942 are emails between 1st Sun's representatives and outside counsel, with 170 of those emails solely involving 1st Sun's outside counsel Dana Friedman.

D. Mr. Connolly's Role

Mr. Connolly is an in-house attorney for AH Biscayne. (Exhibit 2; Connolly Affidavit ("Connolly Aff."), ¶ 1.) In that role, he provides legal advice to AH Biscayne concerning, among other things, loan originations, asset purchases and sales, asset management activities, including loan restructuring and work-outs, and collateralized debt obligation structures. (Connolly Aff., ¶ 3.) While he provides business advice to AH Biscayne on occasion, such as advising on allocation of assets, assumption of business risk,

³ AH Biscayne withdraws its privilege assertion with respect to those documents containing communications involving AH Biscayne's Fred Weber, a licensed attorney, that do not discuss legal advice from Mr. Connolly. As discussed herein, AH Biscayne also withdraws its privilege claim with respect to a number of additional documents that were inadvertently included in its privilege log.

and general business affairs, his primary role as counsel to AH Biscayne is to provide legal advice. *Id.*

In July 2015, Mr. Connolly provided legal advice concerning the negotiation of the parties' July 24, 2015 Tenancy in Common Agreement (the "TIC Agreement") and the First Side Letter. (Connolly Aff., ¶ 5.) He thereafter provided legal advice to AH Biscayne concerning the July 13, 2016 side letter agreement (the "Second Side Letter") and the application and interpretation of the terms of these agreements. When the present dispute arose over those terms, he provided a great deal of additional legal advice concerning the dispute and impending litigation. He also continued to advise AH Biscayne concerning its rights and obligations with respect to its efforts to minimize the damage to the Project caused by the parties' dispute. (Connolly Aff., ¶ 8.)

While Mr. Connolly sometimes provides business advice, he primarily provides legal advice to the organization. Relevant to this dispute, that advice included regular legal guidance on conducting AH Biscayne's affairs in compliance with the parties' agreements and in the months leading up to AH Biscayne's lawsuit. This is distinct from any business advice he provided, such as advising on allocation of assets, assumption of business risk, and the conduct of general business affairs.

AH Biscayne produced 112 unredacted communications between Mr. Connolly and other members of the AH Biscayne team. Where emails involved Mr. Connolly's business-only communications, they were produced. (*See e.g.*, AHB0046233 (email checking on status of wire transfer to Greenberg Traurig); AHB0008562 (email concerning engineering and architecture certificates)(composite exhibit 3).) As set forth in Mr. Connolly's Affidavit (Connolly Aff. ¶ 11), AH Biscayne properly withheld other emails because they contained communications from Mr. Connolly providing legal advice or to Mr. Connolly conveying facts to him for the purpose of obtaining legal advice.

Argument

I. The Documents Withheld By AH Biscayne Are Privileged.

A. Internal Communications

Mr. Connolly's affidavit establishes the basis for AH Biscayne's assertion of privilege with respect to the withheld communications between Mr. Connolly and AH Biscayne's representatives. Indeed, Mr. Connolly provided legal advice to AH Biscayne for more than

a year concerning the parties' agreements, transactions and disputes that are the subject of this lawsuit. (Connolly Aff., ¶¶ 6-8.)

Notwithstanding, 1st Sun blanketly challenges AH Biscayne's claim of privilege with respect to *all* of these communications, and identifies log entries 558, 611, 913, 1655, 1661, 1670, 1707, 1710, 1887 and 1897 as the "starkest examples" of privilege claims that 1st Sun asserts are improper. (Motion to Compel, at 7.) However, a brief description of some of these "examples" confirms the privileged nature of the documents:

- Privilege log entry 558 relates to a July 8, 2016 email between Ivan Kaufman and Maurice Kaufman, principals of AH Biscayne. The email discusses the content of, and AH Biscayne's proposed revisions to, an email from AH Biscayne's outside counsel, Mal Serure, to 1st Sun concerning the draft operating agreement that is at the very heart of this case.
- Privilege log entry 611 relates to a July 11, 2016 email between Ivan Kaufman and Maurice Kaufman, copying AH Biscayne's Fred Weber, wherein Maurice Kaufman and Ivan Kaufman discuss Mal Serure's analysis of, and suggested revisions to, an email to 1st Sun concerning negotiation of the Second Side Letter.
- Privilege log entry 913 relates to a July 13, 2016 email between Ivan Kaufman and Maurice Kaufman, wherein Maurice Kaufman forwards Mal Serure's draft of, and comments concerning, the Second Side Letter.
- Privilege log entries 1707 and 1710 relate to emails between Ivan Kaufman and Maurice Kaufman concerning an email from AH Biscayne's outside counsel, Douglas Heitner at Kasowitz Benson Torres LLP ("Kasowitz"), that provides an analysis of his discussions with 1st Sun's counsel.
- Privilege log entries 1887 and 1897 relate to duplicates of an August 2, 2016 email among Maurice Kaufman, Ivan Kaufman and Fred Weber concerning AH Biscayne's outside counsel, Douglas Heitner's, analysis of his discussions with 1st Sun's counsel concerning 1st Sun's refusal to enter into the operating agreement.

1st Sun cites to log entries 1698, 1702, 1703, 1704, 1714, 1718, 1719, 1726, 1727, 1731, 1732, 1743, 1744, 1745, 1746, 1747, 1756, 1759, 1761, 1764 and 1767 as other

supposed examples of improper claims of privilege. (Motion to Compel, at 9.) However, these documents were properly withheld inasmuch as they all relate to a July 29-30, 2016 email chain among AH Biscayne's representatives and Mr. Connolly that discusses the information they were compiling for Douglas Heitner at Kasowitz in connection with his analysis of AH Biscayne's potential claims against 1st Sun.⁴

B. External Communications.

1st Sun complains that AH Biscayne withheld and redacted certain emails between AH Biscayne, Ocean Bank and Greenberg Traurig. (Motion to Compel, at 4, citing privilege log entries 639, 640, 642, 831, 1578 (Ocean Bank); 1379, 1579 (Greenberg Traurig).) However, each of these emails was redacted or withheld because they contained confidential information about individual investors in AH Biscayne and its related entities. Thus, pursuant to the parties' agreements, there is no basis for disclosure of the withheld and redacted information. These documents were inadvertently included in AH Biscayne's privilege log, and AH Biscayne will remove them from its amended privilege log.⁵

1st Sun also complains that AH Biscayne withheld two documents containing communications with 1st Sun. (Motion to Compel, at 4 citing privilege log entries 286 and 1122.) These documents were inadvertently withheld, and will be produced.⁶

* * *

In sum, AH Biscayne withheld more internal emails than 1st Sun because AH Biscayne -- unlike 1st Sun -- retains an in-house counsel, Mr. Connolly, who provided legal advice concerning the relevant transactions, agreements and disputes. Contrary to 1st Sun's assertion, AH Biscayne did not withhold these emails simply because a lawyer appeared on

⁴ AH Biscayne agrees to withdraw its privilege claim with respect to the documents identified in privilege log entries 614, 644, 1062, 1069, 1398, 1466, 1467, 1655, 1661 and 1670 (many of these are duplicates of the same email). Moreover, with respect to 1st Sun's complaint concerning AH Biscayne's redaction of the document Bates-numbered AHB0019850-51, that document was inadvertently produced inasmuch as it falls outside the agreed-upon date range applicable to the parties' production.

⁵ 1st Sun did not raise any objection to these entries prior to making its motion.

⁶ 1st Sun did not raise any objection to these entries prior to making its motion.

the communication. To the contrary, AH Biscayne made an independent assessment concerning each one of these emails, and produced 112 other internal emails that include Mr. Connolly. Notwithstanding, to the extent the Court believes that an *in camera* review of AH Biscayne's privileged documents is necessary, AH Biscayne does not object to such a review.

II. AH Biscayne's Cross-Motion To Compel.

1st Sun withheld at least 38 internal emails containing communications with its managing director, Pasquale Guliano. (*See* Exhibit 1.⁷) Although Mr. Guliano holds a law degree, it appears that his role at 1st Sun is primarily -- if not exclusively -- a non-legal, business role. Indeed, according to his profile on Belfonti Capital Partners' website, Mr. Guliano "is the managing director of the Belfonti Companies," with "over 25 years of experience in real estate finance and management." (*See* Exhibit 4.)⁸ The profile does not mention that Mr. Guliano provides any legal services to 1st Sun. Consistent with that description, Mr. Connolly understood Mr. Guliano to be acting purely in a business capacity with respect to the transactions and agreements relevant to this lawsuit. (Connolly Aff., ¶ 9.)

Accordingly, there does not appear to be any basis for 1st Sun's privilege assertion with respect to the aforementioned communications involving Guliano, and AH Biscayne respectfully requests that the Court compel their production.

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⁷ Mr. Guliano's internal emails are identified in 1st Sun's privilege log as entries: 12, 36, 147, 148, 149, 150, 164, 167, 196, 209, 210, 213, 217, 219, 221, 228, 233, 252, 257, 258, 260, 342, 343, 349, 406, 440, 467, 473, 547, 548, 549, 562, 598, 602, 603, 604, 732, and 734.

⁸ Mr. Guliano's profile is at <http://www.belfonticapitalpartners.com/teampguliano.php> (accessed May 31, 2017).

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