IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF FLORIDA
PENSACOLA DIVISION

IN RE: ABILIFY (ARIPIPRAZOLE) PRODUCTS LIABILITY LITIGATION This Document Relates to All Cases	Case No.: 3:16-md-2734 Chief Judge M. Casey Rodgers Magistrate Judge Gary Jones

DEFENDANTS' OPPOSITION TO PLAINTIFFS' MOTION TO COMPEL PRODUCTION OF CERTAIN DOCUMENTS ON DEFENDANTS' PRIVILEGE LOGS

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INTRODUCTION

After reviewing hundreds of thousands of documents on a wide variety of issues during the general causation phase of discovery, Defendants Bristol-Myers Squibb. Co. (BMS) and Otsuka America Pharmaceutical, Inc. (OAPI) designated approximately 3,300 documents as containing privileged information. This only constituted roughly two percent of the responsive documents produced during that phase. To support these privilege claims, Defendants generated detailed logs, which, across thirteen columns, conveyed to Plaintiffs all of the information necessary to assess the claims, including the nature of the document and the legal personnel serving as the basis for the privilege claim (the "Logs").

Plaintiffs responded by indiscriminately challenging the vast majority of Defendants' Log entries, including 100% of BMS's claims. Even now, after five months, two rounds of challenges, Defendants' responses, and four meet-and-confer teleconferences, Plaintiffs' Motion maintains objections to approximately 70 percent of Defendants' Log entries and thus reflects a lack of any true effort to evaluate Defendants' claims.

The nature of Plaintiffs' challenges themselves supports the conclusion that those challenges are not well-founded. Plaintiffs first raise three general objections that they claim represent "pervasive inadequacies" warranting total invalidation of Defendants' Logs. Yet none of those objections—regarding identity of litigation

for work-product claims, sufficiency of Log descriptions, and identity of counsel—are supported by the law or the facts.

Plaintiffs then assert nine specific "categories of documents" that they claim "are clearly not privileged or are suspicious." Pls.' Br. i. But here, too, the law and facts demonstrate otherwise. Privileged documents can have each of the characteristics to which Plaintiffs object, including, for example, e-mails on which attorneys are "cc'd" rather than addressed directly. And Defendants' Logs put to rest any concern that Defendants' claims of privilege are overbroad.

For the reasons set forth below, Defendants believe their Logs adequately support their claims of privilege and that Plaintiffs have failed to make a prima facie case for an *in camera* review here. Nevertheless, in order to resolve the dispute expeditiously, Defendants are submitting to the Court representative samples of documents in each of Plaintiffs' nine specific categories. Defendants believe that an *in camera* review of these documents, drawn entirely from the documents Plaintiffs themselves cite in their Motion, will reveal that their arguments are baseless. Thus, the Court should deny the Motion.

RELEVANT BACKGROUND

Plaintiffs' motion challenges Defendants' assertion of privilege over documents produced during the general causation phase of discovery. During that phase, Defendants produced roughly 12 million pages of documents on a wide va-

riety of topics, including clinical trial data and procedures, communications with various regulatory bodies, and analyses of safety issues. Given the breadth of Plaintiffs' document requests and their insistence on a relevant time period extending nearly two years into the litigation, it is no surprise that a small percentage of privileged documents might be captured.

That is precisely what happened. Defendants' careful, multi-layered review identified approximately 3,300 privileged documents—roughly 2 percent of the total set of responsive documents. At Plaintiffs' request, Defendants served privilege logs on May 3, 2017. Those logs detailed the location of the document, the nature of the privilege claim, whether the document was withheld or produced in redacted form, the custodian, any legal personnel identified on the document, the sender and all recipients, the date of the document, and a detailed description of its subject matter.

On or around May 30, 2017, Plaintiffs provided Defendants with challenges to the vast majority of Defendants' privilege claims, including ***every single one*** of BMS's log entries and roughly three quarters of OAPI's log entries. Plaintiffs' challenges were vague, ambiguous, and generally lacked detail necessary for Defendants properly to evaluate and respond to them. For example, for a large portion of their challenges, Plaintiffs merely included the notation "primary purpose"

without further explanation, or asserted vague "general across the board objections" to hundreds of Defendants' entries.

So, during meet and confers on June 7, June 14, and July 6, Defendants explained that they needed further information to evaluate the vast majority of Plaintiffs' challenges, and Plaintiffs agreed to provide revised and more specific challenges. Plaintiffs then waited more than two months to serve their revised challenges on September 12 and 18 on OAPI and BMS, respectively. Although Plaintiffs' revisions were intended to clarify their existing "primary purpose" challenges, in fact Plaintiffs "updated" their objections far beyond any such "clarification." Nevertheless, Defendants responded on September 29 with revised logs addressing Plaintiffs' challenges.

The parties engaged in a final meet-and-confer teleconference on October 3, 2017, during which Plaintiffs, for the first time, expressed concern that both BMS and OAPI had logged e-mails and their attachments together in a single log entry.

On October 10, 2017, Plaintiffs filed their motion to compel, which maintains (and, in many cases, substantially expands) challenges to approximately 70 percent of Defendants' claims of privilege.

ARGUMENT

Plaintiffs assert that three general "inadequacies" invalidate Defendants' Logs as a whole and that, alternatively, nine specific categorical objections warrant

in camera review. They propose further that if the Court determines that any document in a category is non-privileged, it should order Defendants to produce every document Plaintiffs assign to that category. Each argument is unavailing.

I. DEFENDANTS' LOGS ADEQUATELY ENABLE PLAINTIFFS TO ASSESS THE CLAIMS OF PRIVILEGE

Plaintiffs assert three general challenges to the adequacy of Defendants' Logs. They are wrong on all three.

A. Defendants Do Not Need to Identify Specific Litigation in Order to Invoke the Work-Product Doctrine

Plaintiffs argue that only litigation "closely related" to this one warrants work-product protection and, accordingly, criticize Defendants' "failure to articulate the [specific] litigation upon which they base" work-product claims. Pls.' Br. 8–9. The law supports Defendants on both counts.

Federal Rule of Civil Procedure 26(b)(3) protects from discovery "documents and tangible things … prepared in anticipation of litigation or for trial."[1] As the Supreme Court has observed, the "literal language of the Rule" protects materials "prepared for *any* litigation or trial as long as they were prepared by or for a party to the subsequent litigation." *F.T.C. v. Grolier Inc.*, 462 U.S. 19, 25 (1983).

[1] Even upon a showing (which Plaintiffs do not attempt to make) of a "substantial need" for such discovery and that other means of obtaining "the substantial equivalent of the materials" would impose "undue hardship," courts must "protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation." Fed. R. Civ. P. 26(b)(3).

Although "[s]ome older cases took the position that the work-product immunity applied only to documents prepared in direct relation to the case at bar," more recent cases "have generally found that documents produced in anticipation of litigating one case remain protected in a subsequent case[ ] if they were created by or for a party to the subsequent litigation." *Doe v. United States*, 2015 WL 4077440, at *6 (S.D. Fla. July 6, 2015) (quotations omitted). Plaintiffs' authorities—now 20 and 40 years old, respectively[2]—do not reflect this trend.

Moreover, Plaintiffs cite no authority requiring a party to *specifically identify* the litigation supporting a work-product assertion. This is understandable because "litigation need not necessarily be imminent" for work-product protection to apply "as long as the primary motivating purpose behind the creation of the document was to aid in possible future litigation." *United States v. Davis*, 636 F.2d 1028, 1040 (5th Cir. 1981); *see In re Trasylol Prods. Liab. Litig.*, 2009 WL 2575659, at *4 (S.D. Fla. Aug. 12, 2009) (documents privileged where defendant "faced potential exposure to liability on multiple fronts, including but not limited to, regulatory investigation [and] personal injury suits"). Accordingly, it may not

[2] *See Burlington Indus., Inc. v. Rossville Yarn, Inc.*, 1997 WL 404319, at *2 (N.D. Ga. June 3, 1997) (citing *FDIC v. Cherry, Bekaert & Holland*, 131 F.R.D. 596 (M.D. Fla. 1990)); *In re Grand Jury Proceedings*, 73 F.R.D. 647, 653 (M.D. Fla. 1977); *see also Universal City Dev. Partners, Ltd. v. Ride & Show Eng'g, Inc.*, 230 F.R.D. 688, 692 (M.D. Fla. 2005) (holding that *In re Grand Jury* should be "narrowly applied" to the particular needs and investigative function of the grand jury).

be possible to identify the (not-yet-existent) litigation that forms the basis for the assertion.

Similarly, the context of a document may clearly reflect that it was prepared in support of existing litigation or investigation, without specifying a particular proceeding.[3] Rule 26 protects these documents as well as "[d]ual purpose documents created because of the prospect of litigation … even though they were also prepared for a business purpose." *Id.* (citing Fed. Prac. & P. Civ. 2d § 2024 (2009)).

Accordingly, Plaintiffs' motion should be denied as to these documents without the need for the Court to undertake burdensome *in camera* review. *Lislewood Corp. v. AT & T Corp.*, 2015 WL 1539051, at *3 (N.D. Ill. Mar. 31, 2015) (declining *in camera* review in light of appropriate privilege-log descriptions).

B. The Descriptions on the Logs Are Sufficient

Plaintiffs also contend that Defendants' Log descriptions themselves are so inadequate as to constitute waiver of every single claim of privilege. This is not true.

[3] In the course of a vast document review and production across an accelerated time table such as that involved in this case, these kinds of ambiguities are bound to occur without allowing the time or opportunity for counsel to investigate.

The Court's February 7, 2017 Order for Preservation and Production of Documents, Electronically Stored Information, and Privileged Documents (ECF No. 183) (the "ESI Order") requires Defendants' Logs to state:

> (a) the nature of the privilege(s) or other protection claimed;
>
> (b) the factual basis for the privilege(s) or other protection claimed;
>
> (c) the date of the document;
>
> (d) the name of the author(s)/addresser, addressee(s) and all recipients of the document (with respect to e-mail threads, the author/addresser, addressee(s) and recipients of the primary email will be set forth in the author/addresser, addressee(s) and recipient fields of the log) and whether any person identified is an attorney or an employee of any Defendants' legal department;
>
> (e) a description of the general subject matter contained in the document and the type of document (e.g., letter, memorandum, handwritten notes) sufficient to allow the receiving party to assess the claimed Privilege and/or to allow the Court to rule upon the applicability of the claimed protection;
>
> (f) the location of the document; and
>
> (g) the custodian of the document.

ESI Order ¶ 1.2. Even a cursory review of Defendants' Logs shows that they comply with these requirements. Indeed, the court's observations in *In re Denture Cream* apply with equal force here:

> It is hard to fathom how the descriptions from the privilege log … are insufficient to place the Plaintiffs on notice as to the basis of the Defendants' asserted privilege and whether the Plaintiffs had a basis for objecting to that assertion. Other than specifically stating the exact contents of the withheld documents, the undersigned is unclear what other information the Plaintiffs contend that the Defendants should have divulged.

2012 WL 5057844, at *10.

Plaintiffs also complain that descriptions in the Logs "mysteriously changed" after the parties met and conferred. Pls.' Br. 11. But this is the whole point of the meet-and-confer process—i.e., to attempt to find common ground and provide additional information so that privilege assertions can be more accurately assessed.

See Pls.' Ex. 1 (BMS), entries 533-539; Pls.' Ex. 2 (OAPI), OAP_05386135, p. OAPI-22 (all cited in Pls.' Br. 11). Plaintiffs are also poorly situated to advance this argument, as their own objections changed substantially from May 31 (initial challenges) to September 19 (revised challenges) and on through October 10 (this motion) without explanation.

Plaintiffs' additional objection premised on alleged "boiler plate language" in Log descriptions (Pls.' Br. 11) also ignores context. Many of the entries relate to similar documents, necessitating the repetition of certain descriptions. Even so,

Plaintiffs fail to explain how similar descriptions across multiple Log entries "make[s] it virtually impossible for Plaintiffs to assert the relevant objections." Pls.' Br. 11. Either the Logs state the information required by the ESI Order or they do not, and Plaintiffs do *not* contend that any of that information was omitted.[4]

C. The Logs Sufficiently Identify Counsel

Plaintiffs argue further that privilege cannot attach to the entries on Defendants' Logs that do not identify attorneys as having authored, received or been copied on the communication. That is plainly wrong.

"[W]hether a document is protected by the attorney-client privilege or the work product doctrine does not turn solely on whether a particular document reflects that an attorney and/or certain corporate management employees either authored or received the document in dispute." *In re Denture Cream*, 2012 WL 5057844, at *11; *accord United States v. Davita, Inc.*, 301 F.R.D. 676, 681 (N.D. Ga. 2014). "The same protections afforded to communications between counsel and client extend to communications between corporate employees who are working together to compile facts for in-house counsel to use in rendering legal advice to the company." *Fed. Trade Comm'n v. Boehringer Ingelheim Pharm., Inc.*, 180 F. Supp. 3d 1, 34 (D.D.C. 2016).

[4] The one exception is Plaintiffs' "and Attachments" objection, discussed below.

Plaintiffs' own authorities agree. *See, e.g.*, 1 Paul R. Rice, *Attorney-Client Privilege in the United States* § 5:7 & n.1 (2016–2017 ed.) ("To the extent attorney communications are derivatively protected, the relaying of those communications between agents of the client who must act upon that advice is similarly protected."); *In re Vioxx Prod. Liab. Litig.*, 501 F. Supp. 2d 789, 796 (E.D. La. 2007) (privilege extends to "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"); *Guzzino v. Felterman*, 174 F.R.D. 59, 61 (W.D. La. 1997) (acknowledging that privilege may extend not only to documents authored or received by an attorney, but also those "prepared for the purpose of obtaining legal advice from an attorney").

The Log entries that Plaintiffs cite situate the documents at issue squarely under the privilege umbrella.

[5] *See* Pls.' Ex. 2 (BMS) entries 73-75, 77-80 (cited in Pls.' Br. 21 & n.40);

[6] *See id.* at entries 130 (at p. BMS-11), 137 (at p. BMS-11), 162 (at p. BMS-11) (cited in Pls.' Br. 21 & n.39).

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Moreover, the fact that sometimes the attorney who was the original source of the advice or request is not specifically identified does not destroy the privilege that otherwise attaches to that communication. *Cf. Zimmerman v. Poly Prep Country Day Sch.*, 2011 WL 2601481, at *7 (E.D.N.Y. June 30, 2011) (privilege attached even though witness could not remember or locate the name of attorney who provided advice). Sometimes non-attorneys communicating about providing information requested by or advice received from counsel do not specifically identify the counsel by name.[9] The absence of a specific attorney's name, when the context of the basis for the privilege assertion is otherwise evident, does not call the claim into question. Accordingly, the fact that the source of the privilege is identified on the Logs as "legal department" or "outside counsel (unspecified),"

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[7] *See id.* at entry 212 (cited in Pls.' Br. 21 & n.38).

[8] Pls.' Ex. 2 (OAPI), OAP_05393904, p. OAPI-1.

[9] *See, e.g.*, Pls.' Ex. 2 (BMS) entries 48, 76-77, 80, 183–185 (cited in Pls.' Br. 12 & n.14); Pls.' Ex. 2 (OAPI), OAP_05393262, p.OAPI-27; OAP_05397935, p. OAPI-15 (cited in Pls.' Br. 21 nn.32–33).

(*see* Pls.' Br. 12–13), is no basis for conducting an *in camera* review of those documents.

II. PLAINTIFFS' OTHER CHALLENGED "CATEGORIES" OF ENTRIES ALSO FAIL TO JUSTIFY *IN CAMERA* REVIEW

Plaintiffs also identify nine categories of documents from the Logs that they claim are either "clearly not privileged" or are so "suspicious" as to warrant *in camera* review. Here, too, Plaintiffs' challenges are misplaced. While Defendants believe that Plaintiffs have failed to show a need for *in camera* review, Defendants also are submitting a representative sample of documents so the Court may quickly resolve this issue. These documents cover each of Plaintiffs' nine categories and were cited by Plaintiffs themselves in their Motion.

A. Plaintiffs' Challenges to Entries that Include Withheld E-mails and Attachments Together are Deficient

Plaintiffs' challenges to Defendants' Log entries combining e-mails and attachments are meritless for two reasons: *first*, Defendants did exactly what the Parties' agreement permits; and *second*, logging of attachments would reveal the content of the privileged communication.

Contrary to Plaintiffs' contentions, the ESI Order expressly allows Defendants to log withheld e-mails and attachments together in a single entry. The ESI Order provides, in pertinent part, that a party:

> need include only one entry on the [privilege] log to identify a single E-mail Thread (as defined below) that contains multiple e-

> mails with privileged information in the same document; provided, however, that disclosure must be made that such e-mails are part of an e-mail thread and that if any information contained in such thread is not privileged, the remainder of e-mail thread must be produced in redacted form.

ESI Order ¶ 1.2. It also provides:

> To the extent that a Defendant reasonably determines that e-mail *or* related attachments that are responsive to Plaintiff's document request are not discoverable because they are subject to a Privilege, Defendant shall produce a log *treating each e-mail and attachment withheld separately that sets forth the information required by Paragraph 1.2 above*, subject to the logging limitations of Paragraph 1.2 above.

Id. ¶ 1.4 (emphasis added). Thus, whenever e-mails *or* related attachments are withheld for privilege, the ESI Order requires Parties to log e-mails and any "attachments withheld separately." But where e-mails and attachments are withheld as a single, privileged communication, the Parties are permitted to log that privileged family as a single entry—just as they are permitted to do with regard to "E-mail Threads."

Here, again, the bargain the Parties have struck with regard to the logging of withheld e-mails and attachments finds support in Plaintiffs' authorities. As Professor Rice explains, when an entire e-mail communication containing attachments constitutes a single, privileged communication,

> attachments to e-mail messages should not be described in the privilege log because they became part of the confidential communication. This is particularly true when the attachments are nonprivileged documents that could otherwise be discovered from

> the client (or in many cases, have already been produced as stand alone documents). By identifying the attachments, the client would be disclosing the content of what was communicated to the attorney.

2 Paul R. Rice, *Attorney-Client Privilege in the United States* § 11:7 (2016–2017 ed.). And although some courts have required parties to log withheld attachments individually even where they are part of a single privileged communication transmitted via e-mail, (*see* Pls.' Br. 19–20), the parties have agreed otherwise here,[10] and in any event—as Professor Rice notes—the itemization of attachments that are part of privileged communications may tend to reveal privileged information. Courts recognize this. *See Rhoads Indus., Inc. v. Bldg. Materials Corp. of Am.*, 254 F.R.D. 238, 240 (E.D. Pa. 2008) ("the act of itemization might force parties, by disclosing what was sent to the attorney, also to disclose the nature of the privileged information"); *S.E.C., Inc. v. Wyly*, 2012 WL 414457, at *11 (S.D.N.Y. Jan.

[10] Of course, to the extent that the ESI Order is deemed to be ambiguous in this regard, the Parties might have been able to reach agreement on this issue (or at least narrow the issue substantially) had Plaintiffs raised it in a timely manner rather than for the first time at the final, October 3 meet-and-confer. To underscore that point, BMS has identified no fewer than 28 entries on its Log for which Plaintiffs' *sole* objection was that attachments were logged together with their parent emails, and for which BMS learned upon investigation that the attachments either did not exist (2) or were unreadable technical files or irrelevant embedded image files (26). *See* Pls.' Ex. 1 (BMS) Entries 166, 175, 236, 251, 252, 262, 264 (no attachments), 267, 270, 272 (no attachments), 273, 305, 354, 365, 389, 441, 445, 450, 452, 463, 490, 522, 523, 552, 559, 583, 589, 593. A simple correction during the meet-and-confer process could have avoided including these 28 entries in this dispute.

30, 2012) (permitting attachments to e-mails in withheld communications not to be logged).[11]

B. Factual Material Contained in Attorney-Client Communications May Properly Be Withheld as Privileged

Plaintiffs also challenge Defendants' Logs to the extent Plaintiffs believe the Logs contain entries reflecting "factual material created by non-attorneys and provided to attorneys," and ask the Court to impose a blanket rule that all such communications (or at least the portions allegedly containing the factual material) should be disclosed. *See* Pls.' Br. 23–26. This is wrong as a matter of law.

Factual materials submitted to counsel for legal advice can be properly cloaked in attorney-client privilege. *See Johnson v. Ford Motor Co.*, 2015 WL 5193568, at *3 (S.D. W. Va. Sept. 3, 2015) (upholding privilege over a draft investigation report sent to counsel for legal advice, finding "it was a request to ensure that the wording of a report … did not expose the corporation to liability, or negatively affect its position in potential litigation"). And communications may be privileged where non-attorneys "gather information to aid counsel in providing legal services." *Sky Angel US, LLC v. Discovery Commc'ns, LLC*, 28 F. Supp. 3d 465, 486 (D. Md. 2014) ("intracorporate communications concerning information

[11] Undoubtedly, Professor Rice's parenthetical observation—that materials properly withheld as part of a privileged communication may nevertheless have been produced as stand-alone documents—is also true. Where this is the case, Plaintiffs have the documents already.

requested by a lawyer for the purposes of rendering legal advice can be protected by the attorney-client privilege").

Plaintiffs contend that the "the attorney-client privilege 'only protects disclosure of communications; it does not protect disclosure of the underlying facts by those who communicated with the attorney.'" Pls.' Br. 23 (quoting *Upjohn Co. v. United States*, 449 U.S. 381, 395 (1981)). But these principles are not in conflict. Where factual information is conveyed to an attorney, Plaintiffs are correct that the underlying factual information may be independently discoverable, and the privileged nature of their communication to counsel does not cloak those facts forever with privilege. But the privileged nature of the communication also means that those facts cannot be discovered within the context of that privileged communication. Indeed, as the *Upjohn* Court noted, "the privilege exists to protect not only the giving of professional advice to those who can act on it but also the giving of information to the lawyer to enable him to give sound and informed advice." 449 U.S. at 390; *see also Barton v. Zimmer Inc.*, 2008 WL 80647, at *5 (N.D. Ind. Jan. 7, 2008) ("[E]ven though one e-mail is not privileged, a second e-mail forwarding the prior e-mail to counsel might be privileged in its entirety," in the same way that "prior conversations or documents that are quoted verbatim in a letter to a party's attorney" would be.). Plaintiffs' position here "runs contrary to well-established law that information communicated to an attorney in connection with obtaining or

rendering legal advice is properly subject to a claim of privilege, even if the information standing alone would not otherwise be subject to a claim of privilege." *Gen. Elec. Co. v. United States*, 2015 WL 5443479, at *1 (D. Conn. Sept. 15, 2015).

When viewed in the proper legal context, the Log entries Plaintiffs identify as containing discoverable factual information do not raise questions as to the propriety of the privilege assertions in this case.

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[12] *See* Pls.' Ex. 3 (BMS), entries 4, 25 (cited in Pls.' Br. 24 & nn.41–42).

[13] *See* Pls.' Ex. 3 (BMS), entries 50, 52, 77–80 (cited in Pls.' Br. 24 & nn.43–44).

[14] *See, e.g.*, Pls.' Ex. 3 (OAPI), OAP-PRIV0000050, p. OAPI-5 (cited in Pls.' Br. 24 n.45).

[15] *See* Pls.' Ex. 3 (OAPI), OAP_05392670, p. OAPI-20 (cited in Pls.' Br. 25 n.46).

Accordingly, Plaintiffs have failed to raise any question as to the propriety of Defendants' privilege assertions with regard to factual material provided to attorneys, and the Court may therefore decline to conduct an *in camera* review as to these Log entries. *See In re NC Swine Farm Nuisance Litig.*, 2017 WL 2313470, at *5 (E.D.N.C. May 26, 2017).

C. Whether Attorneys Are Copied or are Among Several Recipients of a Communication is Irrelevant to the Privilege Determination

Plaintiffs' challenges to the Logs with regard to those entries indicating that attorneys are merely copied, or describing multiple recipients in addition to counsel, are also without merit.

As noted, the key question for the Court is whether the communication at issue "was made for the purpose of securing legal advice or legal services, or conveying legal advice." *SmithKline Beecham Corp. v. Apotex Corp.*, 232 F.R.D. 467, 480 (E.D. Pa. 2005). For this reason, the specific placement of an attorney as a direct or copied recipient of an e-mail has no bearing on the ultimate analysis. *Hepburn v. Workplace Benefits, LLC*, 2014 WL 12623294, at *2 (E.D.N.C. Apr. 18, 2014). Thus, "the fact that a corporate attorney is copied on an email, rather than appearing as a direct recipient, is not fatal to a claim of privilege"; instead, "[t]he ultimate question is … whether the substance of the communication involves receiving or acting upon legal advice, or otherwise providing information necessary to securing legal advice." *Id.* at *4.

Nearly all of Plaintiffs' cited entries where the attorney is merely "copied" indicate that the purpose of the communication involved receiving or acting upon legal advice. *See* Pls.' Ex. 4 (BMS), entries 24–93 at BMS-2 ( ). Where, as here, Defendants have "appropriately identified the basis for privilege on the log," there is no basis for the Court to conduct *in camera* review. *In re NC Swine Farm*, 2017 WL 2313470, at *3 (declining to conduct *in camera* review of documents on which attorneys were merely copied, where log sufficiently provided basis for privilege).[16]

With regard to those documents involving multiple recipients, as even Plaintiffs' authorities acknowledge, "the number of lawyers or non-lawyers to whom a communication is disseminated is not dispositive." *In re Vioxx*, 510 F. Supp. 2d at 799; *see also Legends Mgmt. Co., LLC v. Affiliated Ins. Co.*, 2017 WL 4227930, at *4 (D.N.J. Sept. 22, 2017) ("[E]-mails with multiple recipients do not … constitute waiver of the privilege."). For example, "documents between business personnel responsible for a project that outlines a situation and requests or relays both legal and business advice from the address and those on the circulate list, which includes

[16] As further evidence of its good faith in connection with this exercise, BMS has reviewed its entries yet again in light of Plaintiffs' revised challenges in their motion to compel. In their motion, Plaintiffs have challenged BMS entries 478 through 489, *see* Pls.' Ex. 4 (BMS) at BMS-1 & Ex. 8 (BMS) at BMS-4, all variations of the same e-mail thread, for the first time on several specific grounds. BMS has reviewed these entries and their corresponding documents in light of these new challenges and will be withdrawing its privilege claims as to these entries.

both legal and non-legal personnel" can be privileged. *McCook Metals L.L.C. v. Alcoa, Inc.*, 192 F.R.D. 242, 254 (N.D. Ill. 2000). "This is one method of simultaneously asking for or relaying legal advice while updating the business people responsible for the operating unit." *Id.*

Nothing in the Log entries identified by Plaintiffs in connection with their "multiple recipients" challenges suggests that the communications were not made for the primary purpose of soliciting or providing legal advice.

The Court should reject Plaintiffs' request that it conduct *in camera* review of these materials and deny Plaintiffs' motion.

D. Defendants' Logs Support the Preservation of the Privilege When Third Parties are Copied on E-Mails

As even Plaintiffs implicitly acknowledge, it is well-settled that "in today's complicated world, attorneys cannot work alone and must hire others to assist them; otherwise they would not be able to render adequate legal advice." *In re Tri State Outdoor Media Grp., Inc.*, 283 B.R. 358, 362 (Bankr. M.D. Ga. 2002) (citing *United States v. Kovel*, 296 F.2d 918, 921 (2d Cir. 1961)); *see also* Pls.' Br. 30

(contending that this argument should be rejected where "public relations consultants" are involved); *In re Grand Jury Subpoenas*, 179 F. Supp. 2d 270, 283 (S.D.N.Y. 2001) (cited in Pls.' Br. 30). "Thus, the presence of a third party does not waive attorney-client privilege 'when the third party is present to assist the attorney in rendering legal services.'" *E.E.O.C. v. v. DiMare Ruskin, Inc.*, 2012 WL 12067868, at *7 (M.D. Fla. Feb. 15, 2012) (quoting *Jenkins v. Bartlett*, 487 F.3d 482, 490–91 (7th Cir. 2007)).

Courts have also extended the privilege umbrella to third parties—*including* public relations firms—acting as agents of the client: "In applying the principles set forth by the Supreme Court in *Upjohn*, there is no reason to distinguish between a person on the corporation's payroll and a consultant hired by the corporation if each acts for the corporation and possesses the information needed by attorneys in rendering legal advice." *In re Copper Mkt. Antitrust Litig.*, 200 F.R.D. 213, 219 (S.D.N.Y. 2001) (privilege extends to public relations firm hired "to perform a corporate function that was necessary in the context of the government investigation, actual and anticipated private litigation, and heavy press scrutiny obtaining at the time").

Defendants' Log entries are consistent with these principles.[17] Additionally, the majority of documents listed in Plaintiffs' Exhibit 5 are not only attorney-client privileged, but also protected work product. "Waiver of the work-product doctrine [] works differently that waiver of the attorney-client privilege." *Dempsey v. Bucknell Univ.*, 296 F.R.D. 323, 329 (M.D. Pa. 2013). "Unlike the attorney-client privilege, where disclosure to a third party waives the privilege unless the disclosure is necessary to further the legal representation, the work-product doctrine serves instead of protect an attorney's work product from falling into the hands of an adversary, and thus disclosure must enable an adversary to gain access to the information for it to constitute waiver of work-product protection." *Id.* (quotations omitted). Plaintiffs make no argument that Defendants have waived work-product protection. Even if Defendants waived attorney-client privilege regarding these documents—which they have not—their Logs still state correctly that the material has been withheld as work product.

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[17] *See, e.g.*, Pls.' Ex. 5 (OAPI), OAP-PRIV0000145, p.OAPI-2 (cited in Pls.' Br. 30 n.54).

[18] *See* Pls.' Ex. 5 (BMS), entries 598–99.

Plaintiffs have failed to raise questions as to these entries sufficient to justify *in camera* review of the documents.

E. Defendants' Logs Make Clear that the Primary Purpose of the Communications at Issue—whether Relating to Scientific and Product Safety, Business Records, Regulatory and Labeling, or Publicity and Promotional Matters—Was the Provision or Solicitation of Legal Advice or Assistance

Finally, Plaintiffs challenge the Defendants' privilege assertions with regard to documents that Plaintiffs perceive to relate principally to Science and Product Safety, Business Records, Regulatory and Product Labeling, and Publicity and Promotion. *See* Pls.' Br. 31–40. As Plaintiffs acknowledge, regardless of the subject matter of the communication, the test "is whether counsel was participating in the communications primarily for the purpose of rendering legal advice or assistance." Pls.' Br. 31 (quoting *In re Vioxx*, 501 F. Supp. 2d at 798). Plaintiffs' view is apparently that any communication that relates to these broad, non-legal categories cannot have been made primarily for the purpose of rendering or obtaining legal advice. That defies common sense and is not the law.

"[T]he fact that the request for a legal opinion relates to an economic issue does not undermine the privileged nature of the communication." *In re NC Swine Farm*, 2017 WL 2313470, at *5. The primary-purpose question dictates when "services that initially appear to be non-legal in nature, like commenting upon and editing television ads and other promotional materials could, in fact, be legal ad-

vice within the context of the drug industry." *In re Vioxx*, 501 F. Supp. 2d at 800; *see also In re Denture Cream*, 2012 WL 5057844, at *16 (holding that since labeling-related documents withheld for privilege were "not concerned with business and/or marketing decisions related to labeling but clearly pertain to legal concerns including potential litigation," the documents were privileged). Plaintiffs attempt to analogize this case to *Vioxx*, where the court concluded that Merck's internal structure meant that "virtually every communication leaving the company has to go through the legal department for review, comment and approval," and that this "did not justify dispensing with [the] company's burden of persuasion on the elements of the attorney client privilege." Pls.' Br. 37–38 (quoting 501 F. Supp. 2d at 800–01). But this case is not *Vioxx*, and any suggestion otherwise is nothing but rank speculation.

Given the modest extent of privilege assertions in light of the scope of Defendants' productions, there is no reason to credit Plaintiffs' allegation that Defendants have somehow involved their attorneys in business matters at their respective companies to shield those matters from discovery, and thus *in camera* review of these materials is unnecessary.

III. PLAINTIFFS' PROPOSAL THAT THE COURT ISSUE BLANKET RULINGS BASED ON A SMALL SAMPLING IS IMPROPER

In their motion, Plaintiffs ask the Court to conduct an *in camera* review of "a reasonable number of documents randomly selected" from Plaintiffs' self-defined

[19] Pls.' Ex. 6 (BMS), entries 16, 153–54, 417–18, 420–22 (cited in Pls.' Br. 33 & nn.61–63); Pls.' Ex. 8 (BMS), entry 2 (cited in Pls.' Br. 37 & n.71).

[20] Pls. Ex. 8 (BMS), entries 73–80 at BMS-1–2; *id.* at entries 43–44, 82–83, 91–93, at BMS-7–8.

[21] Pls.' Ex. 6 (OAPI), OAP_05401501, p.OAPI-2 (cited in Pls.' Br. 34 n.65)

[22] Pls.' Ex. 9 (OAPI), OAP-PRIV0000377, p. OAPI-17 (cited in Pls.' Br. 39 n.76).

[23] Pls.' Ex. 7 (OAPI), OAP_05392670, p. OAPI-8 (cited in Pls.' Br. 35 n.68).

categories and to "order production of all documents" that Plaintiffs claim fit that category if the Court finds that "the documents from any of those categories are improperly designated." Pls.' Mot. at 2. Courts have rejected this approach as too imprecise and contrary to the Federal Rules. For example, in *American National Bank & Trust Co. of Chicago v. Equitable Life Assurance Society of the U.S.*, the Seventh Circuit reversed a Magistrate Judge who permitted the party challenging privilege to pick 20 documents for *in camera* review and invalidated the entire log after finding only 5 of 20 documents not privileged. 406 F.3d 867, 878 (7th Cir. 2005). As the Seventh Circuit explained, "Equitable was sanctioned for having too many good-faith differences of opinion with the magistrate judge. That is unacceptable." *Id.* The court found that "Equitable sought to protect documents for which a good-faith argument in support of privilege could be made, and it did so while treading in an area of privilege law that is generally recognized to be 'especially difficult,' namely, distinguishing in-house counsels' legal advice from their business advice." *Id.* at 879.

Likewise, in *Ajose v. Interline Brands, Inc.*, the court rejected a categorical approach because the proposed categories were so broad that even if a few documents within a category were not privileged, "[t]he attorney-client privilege and work-product doctrine could readily apply to [other] documents within these broad categories." 2016 WL 6893866, at *13 (M.D. Tenn. Nov. 23, 2016); *see also*

Davita, Inc., 301 F.R.D. at 681 ("disagree[ing] with Plaintiff that entire categories of [] documents can be denied privilege status as a matter of law, based solely on the descriptions").

As an alternative, Defendants respectfully suggest that if the Court is inclined to conduct *in camera* review of a sample of documents, then after the Court rules on the documents in that sample Defendants can quickly re-review documents within the affected categories and revise claims as appropriate. Plaintiffs then could quickly bring any remaining—hopefully much fewer—disputes to the Court's attention for resolution through *in camera* inspection. This is a well-recognized procedure for resolving privilege challenges in litigation involving a large number of documents. *See Ajose*, 2016 WL 6893866, at *13 (party given 28 days to supplement its claims of privilege based on rulings over set of documents); *Veolia Water Sols. & Techs. Support v. Siemens Indus., Inc.*, 63 F. Supp. 3d 558, 572 (E.D.N.C. 2014) (party "directed to re-review privilege designations and make further production on the basis of this order within 14 days").

CONCLUSION

Plaintiffs' Motion to Compel should be denied outright. Alternatively, the Court should resolve this issue by reviewing *in camera* the representative sample of documents Defendants are submitting.

Dated: October 17, 2017 Respectfully submitted,

/s/ Matthew A. Campbell
Matthew A. Campbell (*pro hac vice*)
Eric M. Goldstein (*pro hac vice*)
Matthew M. Saxon (*pro hac vice*)
Rand K. Brothers (*pro hac vice*)
WINSTON & STRAWN LLP
1700 K Street, N.W.
Washington, DC 20006
Phone: 202.282.5848
Fax: 202.282.5100
macampbe@winston.com
egoldstein@winston.com
masxon@winston.com
rbrothers@winston.com

Luke A. Connelly (*pro hac vice*)
WINSTON & STRAWN LLP
200 Park Avenue
New York, NY 10166
Phone: 212.294.6882
Fax: 212.294.4700
lconnell@winston.com

Hal K. Litchford (Fla. Bar No. 272485)
Kelly Overstreet Johnson (Fla. Bar No. 0354163)
Russell B. Buchanan (Fla. Bar No. 0055474)
BAKER, DONELSON, BEARMAN, CALDWELL & BERKOWITZ, PC
101 N. Monroe Street, Suite 925
Tallahassee, FL 32301
Phone: 850.425.7500
Fax: 850.270.6661
hlitchford@bakerdonelson.com
kjohnson@bakerdonelson.com
rbuchanan@bakerdonelson.com

Attorneys for Defendant
Otsuka America Pharmaceutical, Inc.

/s/ Larry Hill
Larry Hill (Florida Bar No. 173908)
Charles F. Beall, Jr. (Florida Bar No. 66494)
MOORE, HILL & WESTMORELAND, P.A.
350 West Cedar Street
Maritime Place, Suite 100
Pensacola, FL 32502
850-434-3541
lhill@mhw-law.com
ljohnson@mhw-law.com
cbeall@mhw-law.com
ksullivan@mhw-law.com

Anand Agneshwar *(pro hac vice)*
ARNOLD & PORTER KAYE SCHOLER LLP
250 West 55th Street
New York, NY 10019
212-836-8000
anand.agneshwar@apks.com
Matthew A. Eisenstein *(pro hac vice)*
ARNOLD & PORTER KAYE SCHOLER LLP
601 Massachusetts Ave, NW
Washington, DC 20001
202-942-6606
matthew.eisenstein@apks.com

Barry J. Thompson (*pro hac vice*)
HOGAN LOVELLS US LLP
1999 Avenue of the Stars, Suite 1400
Los Angeles, CA 90067
310-785-4600
barry.thompson@hoganlovells.com

Lauren Colton (*pro hac vice*)
HOGAN LOVELLS US LLP
100 International Drive, Suite 200
Baltimore, Maryland 21202
410-659-2700
lauren.colton@hoganlovells.com

Attorneys for Defendant Bristol-Myers Squibb Company

CERTIFICATE OF COMPLIANCE WITH LOCAL RULE 7.1(F)

I hereby certify that this brief complies with the word limit of Local Rule 7.1(F) and contains 6,682 words, excluding the parts exempted by that Rule.

CERTIFICATE OF SERVICE

I hereby certify this 17th day of October, 2017, a true and correct copy of the foregoing was electronically filed via the Court's CM/ECF system, which will automatically serve notice of this filing via e-mail notification to all registered counsel of record.

/s/ Matthew A. Campbell