

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

CASE NO.: 09-61989-CIV-ZLOCH-ROSENBAUM

JOHN CALLAWAY, on his own behalf
and others similarly situated,

Plaintiff,

vs.

PAPA JOHN'S USA, INC.,

Defendant.

**PLAINTIFF'S RESPONSE MEMORANDUM IN OPPOSITION TO DEFENDANT'S
MOTION TO COMPEL**

Pursuant to the Federal and Local Rules of Civil Procedure, Plaintiff files his Response Memorandum in Opposition ("Response") to Defendant's Motion to Compel Plaintiffs' Responses to Defendant's Second Set of Discovery (Doc. 77) ("Motion to Compel") and states as follows:

SUMMARY OF THE ARGUMENT

Defendant's Motion to Compel asks this Court to require Plaintiff's counsel (through their client) to divulge work product information such as the list of individuals they compiled to be potential witnesses in this action, the nature of the communications with those potential witnesses, and the basis for such communications. Defendant seeks to compel same regardless of whether these individuals are actually witnesses in this case (as those falling within Rule 26's disclosure requirements already have been, and will continue to be, timely disclosed). In so doing, however, Defendant's Motion to Compel focuses little, if any, on merits of the issues before the Court; instead, Defendant's Motion to Compel is yet another veiled attempt at

attacking Plaintiff's counsel and rearguing, for the third time, its position regarding Plaintiff's pending Motion for Conditional Certification.

In short, Defendant's contention that Plaintiff's counsel is "hiding the ball," by protecting its work product notes of their investigative efforts in this case is without legal and factual support. And, while Defendant may be frustrated that Plaintiff(s)- the individual(s) upon whom the discovery at issue was served- has/have no first hand or personal knowledge regarding the investigations at issue conducted by their counsel, it does not give the Defendant a basis to file the meritless Motion to Compel before this Court. Accordingly, absent an order requiring Plaintiff's counsel to completely divulge mental impressions, litigation strategy and work-product, none of which are known to the party Plaintiffs other than through communication with their counsel, Plaintiff submits that Defendant's Motion should be denied.

MEMORANDUM OF LAW

A. Defendant Improperly Seeks Work Product That is Subject to Qualified and Absolute Immunity

The work product doctrine protects from disclosure documents and tangible things prepared in anticipation of, and during, litigation by the plaintiff's counsel acting on behalf of Plaintiffs. *See* Fed. R. Civ. P. 26(b)(3)(A). In this case, Plaintiff's counsel, after researching and preparing its litigation strategy, compiled a detailed list (created from publicly available information on the internet) consisting mostly of Defendant's former employees who maintained the same position as the Plaintiff and opt-in Plaintiffs who already are part of the putative class in this action. Plaintiff's counsel contacted these individuals *via* the electronic communication attached by Defendant to its Motion to Compel.

As a threshold matter in addressing this communication, it is essential to note that: (1) Plaintiff's counsel, in compliance with the Florida Bar Rules did not, and will not, solicit any

individuals on this list to join this lawsuit as the email was intended solely for investigative purposes;¹ and (2) the majority of individuals to whom the communication was directed did not respond to the communication and thus, were not contacted again by Plaintiff's counsel. Accordingly, Plaintiff's counsel has no knowledge regarding the information, or lack thereof, that these non-responding individuals may have regarding the issues in this case. As a result, they are not witnesses subject to disclosure at this time. *See* FRCP 26(a)(1)(A)(i)(requiring disclosure of individuals likely to have discoverable information).² Plaintiff, while maintaining its work product privilege, already has provided Defendant with a privilege log regarding the communication and list at issue. *See* Plaintiff's Privilege Log attached hereto as **Exhibit "A."**

Once work product protection attaches, the doctrine is divided into two categories enjoying different degrees of protection. First is factual work product which Defendant must show both a substantial need and undue hardship to discovery from Plaintiff's counsel. *See Castle v. Sangamo Weston, Inc.*, 744 F.2d 1464, 1467 (11th Cir. 1988). The second category of work product protection is "opinion work product reflecting the mental impressions, conclusions, opinion or legal theories of an attorney." *See Henderson v. Holiday CVS, LLC*, 2010 WL 3153979 (S.D. Fla. 2010), * 5. Such opinion work product has "nearly an absolute immunity and can be discovered only in very rare and extraordinary circumstances." *Id* * 5.

¹ This is evident from the fact that one of the Texas witnesses on the compiled list at issue provided a Declaration in support of this case but was not asked to, and did not, join this case.

² Contrary to Defendant's representations, although the third party witness, Kevin Smith, contacted Plaintiffs' counsel on July 17, 2010 via email, Plaintiffs' counsel did not speak and conduct an investigation of Kevin Smith's allegations until twenty-four (24) hours before the filing of Plaintiff's Motion for Conditional Certification and within one week of filing same, Plaintiffs provided Defendant with Kevin Smith's known contact information. At no time was Plaintiffs' counsel "hiding the ball," rather, the disclosure of the third-party witness was unnecessary until Plaintiffs' counsel determined (some twenty-four (24) hours before filing their Motion for Conditional Certification) that third-party information would support Plaintiffs' claims. *See* Fed. R. Civ. Pro. 26(a)(1)(A)(i).

i. Defendant's Interrogatories and Requests for Production Seek to Discover Factual and Opinion Work Product.

In an effort to highlight Defendant's discovery requests and Plaintiff's answers and objections to same, a summary of Defendant's two Interrogatories and two Requests for Production and reasons for Plaintiff's work-product objections are detailed below:

Interrogatory No. 1 requests Plaintiff to identify including email addresses, all recipients of electronic communication that are the same or similar to the email communication sent by Plaintiff's counsel to a list of mostly Defendant's former employees. *See* Defendant's Motion p. 6. Plaintiff and all other Opt-In Plaintiffs responded that they had no knowledge regarding the email communication sent by their counsel. *See* Answers to Defendant's Second Set of Interrogatories reproduced in Defendant's Motion at p. 6 and 7. The list that Defendant seeks to compel from Plaintiff's counsel (through their client) was created in anticipation of and during litigation. This list is a compilation of email addresses, consisting mostly of Defendant's former employees, and to the extent Plaintiff's counsel received any discoverable information that would support or deny Plaintiff's claims, it was properly disclosed to Defendant. To compel the disclosure of information requested in Interrogatory No. 1, would require Plaintiff's counsel to disclose individuals that may or may not have information that would either support or deny Plaintiff's claims and most disturbingly, forces Plaintiff's counsel to divulge factual information created during litigation, i.e. factual work product.

Interrogatory No. 2 requests that Plaintiff describe the source used to obtain the contact information for the individuals emailed by Plaintiff's counsel. Plaintiff and all other Opt-In Plaintiffs answered that they had no knowledge regarding the source, but again, Defendant seeks to compel Plaintiff's counsel's litigation material, by improperly requesting it through each Plaintiff.

As with Interrogatory No. 1, each Plaintiff is unaware of their counsel legal workings and litigation strategy. Nonetheless, Plaintiff's counsel provided a privilege log, which generally describes how Plaintiff's counsel obtained the email contact information for those individuals at question in Defendant's Motion. Any further information would force Plaintiff's counsel to reveal mental impressions and legal theories, i.e. opinion work product.

Requests for Production No. 1 and No. 2 seek all written communication sent by or received by Plaintiff or his/her counsel, to or from any third party emailed by Plaintiff's counsel. Plaintiff and all other Opt-In Plaintiffs answered that they had no knowledge regarding the items requested. To the extent the Plaintiffs' responses sound like a "broken record," it is simply because Defendant unreasonably expects Plaintiff to have information concerning Plaintiff's counsel's litigation strategy and mental impressions, which Plaintiff's counsel contends is undiscoverable, because it is immune under work-product protection. As with Defendant's entire second set of discovery requests, Plaintiff(s) lack any knowledge or information concerning the Requests for Production. During the course of Plaintiff's counsel's investigation, one witness (Kevin Smith) was discovered to have information that Plaintiff would likely use to support his claims. This witness was properly disclosed. To date Plaintiff's counsel has not uncovered any further information that would support or deny Plaintiff's claims and therefore, is not required to disclose unknown information or the names of individuals that may or may not have information likely to support or deny Plaintiff's claims. All other information contained in documents compiled by Plaintiff's counsel was during the course of litigation and is strictly protected by work-product privilege.

ii. Defendant Fails to Demonstrate a Substantial Need and Undue Hardship.

Clearly, Defendant seeks to discover information that is the “fruit of an attorney’s trial preparation materials.” As demonstrated above, Defendant’s interrogatories and requests for production of documents seek both factual and opinion work product in that they request information concerning Plaintiff’s counsel’s ongoing investigation into Plaintiffs’ claims. However, Defendant fails to demonstrate a substantial need and undue hardship for the production of any factual work product and certainly has not established any “rare or extraordinary circumstances” meriting the production of opinion work product. *See Castle* at 1467. The **only** reason that Defendant provides in support of its Motion is that the information requested is calculated to lead to the discovery of admissible evidence, it is highly relevant, and such information is not available from other sources. *See Motion* at p. 6. Defendant’s sole reason falls short of a substantial need and undue hardship, let alone “rare and extraordinary circumstances.” *Id.*

Plaintiffs clearly stated, without waiving any objections, that they had no knowledge regarding Defendant’s second set of discovery. This fact has not changed. Any information Plaintiff’s counsel has, or conveyed to its clients, concerning the discovery requested is contained in documents created by Plaintiff’s counsel in anticipation of, and during litigation. This is the very definition of work product material. *See id.* Further, Plaintiff’s counsel provided a privilege log generally describing the information being requested. Moreover, Plaintiff’s counsel interviewed only one person (Kevin Smith) arising from the investigation Defendant seeks to discover and Plaintiff timely disclosed Mr. Smith upon securing his Declaration. Assuredly, should Plaintiff’s counsel interview any further potential witnesses arising out of the investigations at issue, such information will be “timely” disclosed. *See Fed. R. Civ. Pro. 26(e)(1)(A).*

As to merits, or lack thereof, of Defendant's Motion to Compel, and notwithstanding the fact that Defendant never conferred with Plaintiff as alleged, Defendant's Motion is moot because Plaintiff provided a privilege log. Furthermore, despite Plaintiffs' counsel repeated requests that Defendant's counsel withdraw the Motion in light of same, Defendant has inexplicably refused to do so, thereby requiring this Response. *See* copies of email between Defendant and Plaintiffs' counsel attached hereto as **Exhibit "B."** Defendant continues to muddy the waters regarding the issues before this Court and is clearly frustrated because it cannot discover the undiscoverable- work product materials. Nonetheless, Plaintiff's counsel will continue to avoid "swinging at pitches in the dirt" and intends to keep litigation professional before the Court.

CONCLUSION

For the reasons set forth above, the Plaintiff respectfully requests that the Court deny Defendant's Motion in its entirety, and preserve the work product immunity protection, afforded to the information at issue.

Dated this 27th day of August 2010.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on August 27th 2010, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF, which will send a notice to all counsel of record.

NANETTE LEVI, ESQ.
NANETTE LEVI, ESQ.