UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

MASTER CASE NO.: 09-MD- 02106-CIV-GOLD
Magistrate Goodman

In Re: FONTAINEBLEAU LAS VEGAS
CONTRACT LITIGATION

MDL NO. 2106

This document relates to all actions.
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FONTAINEBLEAU RESORTS, LLC'S RESPONSE IN OPPOSITION TO TERM LENDERS' MOTION FOR DETERMINATION OF WAIVER OF PRIVILEGE

Third Party, Fontainebleau Resorts, LLC ("FBR"), through its undersigned counsel and in accordance this Court's Order dated November 29, 2010 [D.E. 190], respectfully submits the following Response in Opposition to the Term Lenders' Motion for Determination of FBR's Waiver of Privilege, dated December 6, 2010 [D.E. 192]:

I. Introduction

The Term Lenders themselves have previously described the underlying litigation as a "legal storm." FBR, though not a party to this litigation, has found itself caught up in that storm. The Court should decline Term Lenders' invitation to find a wholesale waiver on the part of FBR because Term Lenders created this predicament by causing FBR to incur an undue burden and expense in responding to their subpoena and corresponding Court Orders.

Federal Rule of Civil Procedure 45(c), entitled, "***Avoiding Undue Burden or Expense; Sanctions***," is designed to avoid this circumstance visited upon a third party. It provides:

> A party or attorney responsible for issuing and serving a subpoena must take reasonable steps to avoid imposing undue burden or expense on a person subject to the subpoena. The issuing court must

> enforce this duty and impose an appropriate sanction – which may include lost earnings and reasonable attorney's fees – on a party or attorney who fails to comply.

See also Klay v. All Defendants, 425 F.3d 977, 982-984 (11th Cir. 2005); *Davidson v. Government Employees Insurance Company*, 2010 WL 4342084, *5 (M.D. Fla. Oct. 26, 2010).

Despite having limited resources, FBR has fully complied with the Term Lenders' subpoena. It has also taken reasonable efforts under the circumstances to protect its privileges in the process, militating against any finding of waiver. Initially, FBR filed a Motion for Entry of a Confidentiality Order to govern its responses.[1] Although the Court denied FBR's Motion on the grounds it might reveal the Term Lenders' work product, it would be difficult for Term Lenders to suggest that the mere identification and return of any privileged materials would constitute their own attorneys' work product.

In addition, FBR conducted a privilege review of its *e-mail server*. This alone demonstrates FBR's efforts to protect its privileged materials. The primary reason FBR was unable to identify only responsive documents from its *document server* – and identify privileged materials in the process

[1] *Behrend v. Comcast Corporation*, 248 F.R.D. 84 (D. Mass. 2008), previously relied upon by Term Lenders, confirms that FBR has acted reasonably. The court in that case identified factors to be considered in deciding cost allocation where a non-party is required to respond to a subpoena. Though Term Lenders are no longer seeking monetary relief against FBR, that case nonetheless confirms that any expense associated with the subpoena should be incurred by Term Lenders. Notably, in *Behrend*, the plaintiff had offered to review the third party's documents wherever they were stored *before* it incurred the expense of a privilege review. 248 F.R.D. at 85. Here, the Term Lenders are proposing that FBR's privileges be deemed waived. The plaintiff in *Behrend* had also stipulated that its document review would be subject to all of the protections contained in an existing Protective Order in the underlying litigation and offered to enter into an additional stipulation specifically preserving Greater Media's privilege claims, if any. 248 F.R.D. at 85-86, n. 3. The Term Lenders here propose the opposite.

– is because of the incredible expense. Under normal circumstances and as Rule 45 mandates, this expense would have been incurred by the Term Lenders.

When FBR was unable to incur the incredible expense of conducting a privilege review of the document server , and at the same time comply with the Term Lenders' subpoena and the Court's requirements, it provided Term Lenders with the document server. Now, having obtained full access to it, the Term Lenders seek the Court's imprimatur to allow them to use these confidential and privileged documents for whatever purpose they wish and without any further obligations whatsoever. This request should be denied.[2]

II. Additional Efforts by FBR to Comply with the Subpoena

For several months, FBR worked collaboratively with the Term Lenders to, among other things, apply search terms to the *e-mail server* to identify potentially responsive documents and to reduce the size of potentially responsive documents by seventy-five percent. That process did not occur, however, with respect to the *document server*. As such, FBR had no option but to produce a full copy of it without conducting a privilege review. Under these extraordinary circumstances, and as explained below, this is not tantamount to an intentional waiver.

Term Lenders admit the cost to review the document server for responsive documents would have been approximately $200,000.00. This is separate and apart from the cost FBR would have

[2] Term Lenders do not indicate whether they, or their attorneys, intend to use FBR's most confidential of documents solely in connection with this case, or in relation to other litigation, or whether they propose to freely share FBR's records with others (or if they have already done so), free of accountability or responsibility for their confidential or privileged nature.

incurred conducting a privilege review after that search process was completed.[3] Yet Term Lenders suggest that FBR – a third party – was required to either incur this expense or, if not, be accused of waiving its privileges. Term Lenders do not cite to a case to support such an argument. Indeed, their use of the subpoena process and the relief they seek is violative of Rule 45. FBR has limited resources and no employees to help conduct a privilege review or help locate responsive documents. Thus, Term Lenders' argument that FBR could have done so without significant expense is without merit.

In addition, the Term Lenders never provided FBR with search terms to apply to the document server in order to limit the scope of responsive documents and associated expense. Term Lenders previously acknowledged in their Supplemental Memorandum in Support of Motion for Sanctions, dated November 12, 2010 [D.E. 182] that "[i]n the normal course of production, the producing party works collaboratively. . . to modify and narrow the search terms in order to reduce the problem of false positives." Though that process was done with the e-mail server, it was not done with the document server.

III. FBR Did Not Waive Its Privileges with Respect to the Document Server

In determining whether privilege has been waived, the court must consider: (1) the reasonableness of precautions taken to prevent inadvertent disclosure, (2) the amount of time it took the producing party to realize its error, (3) the scope of the production, (4) the extent of the inadvertent disclosure, and (5) the overriding interest of fairness and justice. *United States Fid. &*

[3] This is also separate and apart from the cost FBR already incurred in shipping approximately ninety boxes of documents from Las Vegas to South Florida and processing the email server to the Term Lenders' specifications.

Guar. Co. v. Liberty Surplus Ins. Corp., 630 F.Supp.2d 1332, 1336 (M.D.Fla. 2007).

These factors weigh in favor FBR and against the relief sought by the Term Lenders. First, FBR took reasonable precautions to avoid inadvertent disclosure under the circumstances. FBR first filed a Motion for Confidentiality Order prior to the disclosure and the Court-imposed deadline for production.[4] Due to the size of the production, it would have been financially and logistically impossible to conduct a privilege review of twenty million pages of documents within the production deadline (especially when the Court considers that FBR had no employees to undertake such an effort). Thus, FBR took the only available precaution to protect its privileges before it disclosed the privileged information. It cannot be credibly argued that FBR's production of the entire document server without the protection of a Confidentiality Order was "inconsistent with maintaining the confidential nature of the. . . privilege" such that the holding in *Pensacola Firefighters' Relief Pension Fund Bd. Of Trs. v. Merrill Lynch Pierce Fenner & Smith, Inc.*, 265 F.R.D. 589 (N.D.Fla. 2010) would apply. In fact, considering that the cost to cull and then review the document server would have been over $200,000.00, FBR took the only available reasonable effort to protect its privileges when it filed a Motion for Confidentiality Order, while, at the same time, complying with the subpoena and corresponding Court Orders.

Next, the scope of production also weighs in favor of FBR. The document server alone contains twenty million pages. Although Term Lenders focus only on the document server, FBR's

[4] Certainly, such an effort under these circumstances constitutes a reasonable precaution as contemplated by the court in *Ciba-Geigy Corp. v. Sandoz Ltd.*, 916 F.Supp. 404, 412 (D.N.J. 1995). This, especially when taking into account, as the court did in *Ciba-Geigy,* the size of FBR's document production – approximately twenty million pages on the document server alone.

production here was not limited to the document server. In fact, FBR undertook extensive efforts to apply search terms to the email server[5] and to conduct a privilege review of the documents that were identified in the search.[6] However, since the Term Lenders never provided search terms for the document server, the same process could not have been undertaken by FBR even if it had been ordered to do so. Clearly, under these circumstances, the overriding interests of fairness and justice also weigh in favor of FBR, a third party to this action who has already incurred significant expense in complying with the Term Lenders' subpoena.

Weil v. Investment/Indicators, Research & Mgmt., Inc., 647 F.2d 18, 25 (9th Cir. 1981), cited by Term Lenders, in clearly inapplicable under these circumstances. *Weil*, a 1981 case, dealt with inadvertent disclosure of *one letter* during discovery and related testimony during a deposition. The disclosure at issue here, stemming from an electronically maintained document server, is much larger and of an entirely different magnitude. The court in *Weil* also held that the subjective intent of the producing party must be considered in determining whether its privileges were waived. Clearly, it was not FBR's intent to waive all applicable privileges. Rather, FBR was put in the undesirable position of having to spend over $200,000.00 or turn over the entire document server. Faced with such a decision, FBR's production of the entire server was not voluntary such that the holding in *United States v. Suarez*, 820 F.2d 1158 (11th Cir. 1987) would apply, either.

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[5] FBR paid IKON, a third party copying vendor, approximately $25,000.00 to apply the Term Lenders' search terms to the e-mail server.

[6] In addition, FBR paid to ship nearly ninety boxes of documents from Las Vegas to South Florida so that they could be made available to Term Lenders for inspection and copying. Despite having already copied these documents, Term Lenders are now asking to impose further obligations on FBR relating to documents, some of which have already been produced.

The Term Lenders also cite to *Federal Deposit Ins. Corp. v. Marine Midland Realty Credit Corp.*, 138 F.R.D. 478 (E.D.Va. 1991) in support of their Motion. However, *Federal Deposit* supports FBR's position. In *Federal Deposit,* the court held that "a party may be excused from the waiver consequences of inadvertent disclosure where the number of documents to be screened is large and the time for screening short. *See Transamerica Computer*, 573 F.2d 646 (17 million documents to be screened in three months)." Here, FBR produced twenty million pages of documents on the document server alone. FBR did not obtain a copy of its document server until August, giving it approximately three months to cull and conduct a privilege review of twenty million pages of documents (while at the same time culling and reviewing the email server and approximately ninety boxes of documents at great expense). If the size of FBR's production here does not warrant avoidance of waiver, it is hard to imagine a situation that does.

IV. Conclusion

For these reasons, as well as those set forth in FBR's prior filings, FBR respectfully requests that the Term Lenders' Motion be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on December 13, 2010, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF. I also certify that the foregoing document is being served this day on the attached service list through transmission of Notices of Electronic Filing generated by CM/ECF.

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