**UNITED STATES DISTRICT COURT**
**NORTHERN DISTRICT OF FLORIDA**
**PENSACOLA DIVISION**

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

# MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' MOTION TO COMPEL PRODUCTION OF CERTAIN DOCUMENTS ON DEFENDANTS' PRIVILEGE LOGS

## Table of Contents

**Page**

## Table of Authorities

**Page(s)**

### Cases

**Rules**



**Other Authorities**

## I. Introduction

Defendants' privilege logs show, on their face, that many of their claims of attorney-client privilege and work product protection are invalid. For example:

- Defendants' logs are so unspecific and contain such pervasive inadequacies that touch every single entry on their logs, that they have not sustained their burden of establishing privilege;
- Defendants make blanket claims of privilege of all attachments contained in emails, without describing the attachments;
- An alarming number of documents show no attorney involvement, as no attorney is listed as an author, recipient, or copyee;
- Defendants inappropriately claim privilege over numerous communications that have been dispersed to many non-attorneys or are simply copied to an attorney;
- Defendants inappropriately claim privilege over many pre-existing, factual documents that were simply transferred to an attorney's possession;
- Defendants claim privilege over communications and materials that have been copied or sent to third-parties;
- Defendants obviously involve their in-house attorneys in all facets of their businesses and improperly try to use that involvement to claim privilege over hundreds of unprivileged documents that concern scientific, regulatory, promotional, and/or business issues, none of which are primarily legal in nature.

Defendants' exaggerated privilege claims create a burden for Plaintiffs and this Court. Yet, the claims must be judged. Indeed, taking

them as gospel "would foreclose meaningful inquiry. . .and any spurious claims could never be exposed." *Bell v. Pfizer, Inc.*, 2006 U.S. Dist. LEXIS 62611, at *12 (S.D.N.Y. Aug. 31, 2006) (internal quotations and citations omitted). And as the Honorable Judge Jones articulated at the most recent hearing, [redacted]

Accordingly, Plaintiffs respectfully ask that the Court strike Defendants' privilege logs as a whole for lack of specificity and for its overarching inadequacies, or in the alternative, as suggested by the Court at the most recent hearing, order the Defendants to submit for *in camera* review — sorted by subject matter category — a reasonable number of documents randomly selected by the Court from the subject matter categories contained in Exhibits 1-9 attached to this motion. Should the Court find that the documents from any of those categories are improperly designated as protected, the Court should order production of all documents from the respective categories.

[redacted]

## II. Facts

On May 3, 2017, Defendants served their privilege logs on its general discovery production, with BMS asserting attorney-client privilege or work product protection on 775 documents, and OAPI asserting the same on 661 documents. On May 30, 2017, Plaintiffs served their first round of challenges to Defendants' privilege logs. The parties subsequently conducted meet and confer conferences on June 7, 2017, June 14, 2017, July 6, 2017, and October 3, 2017, to attempt to work out many of the logs' deficiencies.

On September 12, 2017, Plaintiffs served OAPI, and on September 18, 2017 BMS, with their second set of challenges. On September 29, 2017, BMS and OAPI responded with their second updated privilege log. On September 26, 2017, Magistrate Judge Gary R. Jones conducted a hearing to discuss outstanding discovery motions. Judge Jones instructed Plaintiffs to bring any motions to compel based on Defendants' general causation discovery privilege logs by October 9, 2017, with the response due by October 16, 2017.[2] At the hearing, Judge Jones expressed his intent to conduct [redacted]

[2] The dates were later adjusted to October 10, 2017, and October 17, 2017, respectively. *See* ECF # 556.

[redacted]

While Plaintiffs believe that almost every entry on Defendants' logs are inadequate, to accommodate the process, Plaintiffs have dropped 227 of their challenges to OAPI's logs,[4] and 138 challenges to BMS' logs.[5] Plaintiffs bring this motion based on 434 remaining claims of protection in OAPI's log, and 391 claims of protection in BMS's logs, requesting that all of these claims of protection be denied. In the alternative, Plaintiffs request that the Court conduct an *in camera* review of a representative sampling of nine categories of documents and order production of all documents from those categories, based on the Court's findings.

## III. Argument

Rule 26(b)(5)(A)(ii) of the Federal Rules of Civil Procedure requires a party withholding otherwise discoverable information under claims of privilege or work product to "describe the nature of the documents . . . in a manner that, without revealing information itself privileged or protected,

[redacted]

[4] OAPI has not withdrawn a single claim.

[5] While BMS has fully withdrawn 246 claims of protection, it did not provide Plaintiffs these documents until Friday, October 6, 2017. Plaintiffs are loading these documents now, but had insufficient time to review them prior to the drafting of this motion.

will enable other parties to assess the claim." Specifically, "the objecting party must provide a log or index of withheld materials that includes for each separate document, the authors and their capacities, the recipients (including copy recipients) and their capacities, the subject matter of the document, the purpose for its production, and a detailed, specific explanation of why the document is privileged or immune from discovery." *Pensacola Beach Cmty. United Church, Inc. v. Nat'l Union Fire Ins. Co.*, 2007 U.S. Dist. LEXIS 16002, at *5 (N.D. Fla. Mar. 7, 2007) (internal citation omitted). "[This] burden, is not, of course, discharged by mere conclusory or *ipse dixit* assertions, for any such rule would foreclose meaningful inquiry into the existence of the relationship, and any spurious claims could never be exposed." *Campero USA Corp. v. ADS Foodservice, LLC*, 916 F. Supp. 2d 1284, 1287 (S.D. Fla. 2012) (internal quotation and citation omitted). Finally, "if the party invoking the privilege does not provide sufficient detail to demonstrate fulfillment of all of the legal requirements for application of the privilege, his claim will be rejected." *CSX Transp., Inc. v. Admiral Ins. Co.*, 1995 U.S. Dist. LEXIS 22359, at *8 (M.D. Fla. July 20, 1995) (internal citation and quotation omitted).

### A. Defendants' Logs are so Unspecific and Contain Such Pervasive Inadequacies that the Logs as a Whole Should be Considered Legally Insufficient.

Before addressing the various categories of clearly unprivileged or suspicious documents that the Court has mentioned for *in camera* review, Plaintiffs stress that Defendants' logs contain such overarching and pervasive inadequacies that all claims of privilege should be considered waived. Indeed, courts have held that the remedy for insufficient logs is a finding that the privilege has not been established. *See*, *e.g.*, *Stempler v. Collect Am., Ltd*., 2000 U.S. Dist. LEXIS 3313, at *7 (E.D. La. March 14, 2000) ("[i]f the privilege log is not specific enough, the Court may find that [the party] has waived all claims of privilege"); *United States v. Constr. Prods. Research, Inc.*, 73 F.3d 464, 473 (2d Cir. 1996) (no privilege where log contained only "a cursory description of each document"); *Haid v. Wal-Mart Stores, Inc.*, 2001 U.S. Dist. LEXIS 10564, at *3-4 (D. Kan. June 25, 2001) ("[t]he law is well settled that failure to produce a privilege log or production of an inadequate privilege log may be deemed waiver of the privilege"); *T.I.G. Ins. Corp. of America v. Johnson,* 799 So.2d 339 (Fla. Dist. Ct. App. 2001) (affirming trial court's finding waiver of a party's privilege

claims because it failed to provide sufficient descriptions of the documents.).

**1. Failure to Identify the Specific Litigation Invoked for the Work Product Doctrine**

Defendants repeatedly assert work product protection on the grounds that the document concerns [redacted] or that they were created for [redacted] Defendants even invoke work product protection for documents that were created *years* before litigation was commenced or threatened in the current case. For example, Defendants invoke work product protection on:

[redacted]

[6] BMS Ex. 2, entries 28, 29.

[7] BMS Ex. 1, entry 40.

Obviously, these communications cannot [redacted] litigation, since they were made years before these cases were filed. OAPI similarly claims work product protection on:

[redacted]

Even for the most recently created documents, Defendants' failure to identify *which* litigation is being invoked for the work product protection greatly impedes Plaintiffs from assessing the claims — it is necessary but missing information. Indeed, Florida federal courts have held that the work product doctrine does not extend to earlier litigations. *See In re Grand Jury Proceedings*, 73 F.R.D. 647, 653 (M.D. Fla. 1977) (subsequent litigation found to be distinct and, therefore, work product did not operate to protect documents in second case). Other courts within the Eleventh Circuit have held that the two litigations must be "closely related" for the work product

[8] OAPI Ex. 8, OAP_05398407, p. OAPI-8.
[9] OAPI Ex. 2, OAP-PRIV0000330, p. OAPI-25.

privilege to extend to another litigation. *See Burlington Indus. v. Rossville Yarn*, 1997 U.S. Dist. LEXIS 10347, at *7 (N.D. Ga. June 2, 1997).

Plaintiffs have no idea if Defendants are basing the privilege on, for example, a patent claim, their previous DOJ investigation, the recent litigation with the consortium of Attorneys General, or any other unrelated Abilify litigation which Defendants have already argued are "unrelated." This makes it impossible for Plaintiffs to analyze Defendants' log and to assert their challenges. Given that many of the emails were sent years prior to threatened litigation in the matter, logically, many are unrelated to the current litigation. Defendants' failure to articulate the litigation upon which they base the work product protection is fatal and therefore, these claims should be considered waived.

**2. Failure to Provide Adequate Descriptions of the Documents Being Withheld**

This Court's February 7, 2017 Order concerning electronically stored information requires Defendants to describe the document, "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."[10] Here, Defendants inadequate descriptions allow for neither.

It is well established that the party asserting privilege must provide an adequate description of the subject matter of the communication withheld. *See In re Vesta Ins. Grp., Inc. Sec. Litig.*, 1999 U.S. Dist. LEXIS 23541, at *13 (N.D. Ala. May 28, 1999) (withholding party should "produce a privilege log that sufficiently describes the nature of the items" such that the opposing party "can determine whether they will contest a claim of privilege and such that the court can assess whether a privilege is properly invoked"); *Hinson v. Titan Ins. Co.*, 2014 U.S. Dist. LEXIS 187341, at *6 (N.D. Fla. Apr. 2, 2014) ("privilege log should identify each document and the individuals who are parties to the communications and provide sufficient detail to permit a judgment as to whether the document is at least potentially protected from disclosure") (*citing United States v. Constr. Prods. Research, Inc.*, 73 F.3d 464, 473 (2d Cir. 1996)).

As an initial matter, it is important to note that Defendants' descriptions keep changing. For example, several of BMS's initial descriptions that indicated the document in question concerned [redacted]

[10] February 7, 2017, Order for Preservation and Production of Documents, Electronically Stored Information, and Privileged Documents, ECF # 183, p. 3.

[redacted] were mysteriously changed to [redacted] in later versions of the log.[11] Similarly, OAPI's log initially described documents as concerning [redacted] but were later revised to concern [redacted][12] Defendants' logs are replete with these types of curious changes.

Second, the latest entries' descriptions lack the requisite specificity. Hundreds of the descriptions use the same boiler plate language, making it impossible to distinguish the privileged from the non-privileged. For example, in its most recent log, BMS maintains protection on [redacted] These identical, cryptic descriptions make it virtually impossible for Plaintiffs to assert the relevant objections and thus Defendants' logs are inadequate.

[11] BMS Ex. 1, entries 533-539.
[12] OAPI Ex. 2, OAP_05386135, p. OAPI-22.

**3. Failure to Identify Counsel Involved**

When privilege is asserted on the basis that the document was prepared at the direction of counsel, the privilege log must identify the counsel involved. *See Smiley v. City of Philadelphia*, 1995 U.S. Dist. LEXIS 15980, at *8 (E.D. Pa. Oct. 30, 1995) ("at a minimum" the party asserting attorney-client privilege must provide "the date of the document, the name of its author, the name of its recipient, the names of all people given copies of the document, [and] the subject of the document . . .") (internal citations and quotations omitted).

For numerous entries, Defendants fail to meet their burden of adequately identifying the attorney for whom the privilege is invoked. Indeed, it often lists an identifiable attorney as the basis for the privilege even though the logs identify no involvement of that attorney as author, addressee or copyee.[13] Sometimes BMS will withhold a document on the grounds it involves [redacted] — though once again, no attorney is listed as author or recipient.[14] Similarly, OAPI claims repeatedly that the privilege was based on an

[13] BMS Ex. 2, entry 28; OAPI Ex. 2, OAP_05393904, p. OAPI-1.
[14] BMS Ex. 2 entries 48, 76, 77, 80, 183, 184, 185.

[redacted][15] At times the logs are even nonsensical, describing the document as [redacted].[16]

For these documents there can be no privilege, as "the name and title of both the persons sending and receiving a particular document are critical to two elements of the attorney-client privilege." 2 Paul R. Rice, *Attorney-Client Privilege in the United States* § 11.6, at p. 56 (2d ed. 1999). Indeed, the "identity of individuals involved in allegedly privileged communications" is information that ''must be disclosed in order to factually prove the elements of the privilege." *Id*. at § 11:6, pp. 46-47.

### B. Several Categories of Documents are Clearly Not Privileged or are Suspicious and the Court Should Conduct an *in Camera* Review and Order their Production

Apart from the fundamental inadequacies of the logs, there are additional bases to reject many of Defendants' claims. Many categories of Defendants' claims are simply beyond the pale, ignoring both the narrow scope of privilege and the requirements needed to establish its

[15] OAPI Ex. 2, OAP-PRIV0000037, p. OAPI-5; OAP_05389962, p. OAPI-23.
[16] OAPI Ex. 1, OAP-PRIV0000352, p. OAPI-8.

applicability. Defendants incorrectly extend attorney-client privilege or work product protection on unidentified documents, described simply as [redacted] The Defendants assert the protections on several hundred documents not authored, sent to, or copied to an attorney. They also claim protection on pre-existing and underlying information simply transferred to their attorneys. They claim protection on documents that were distributed to a legion of non-attorneys, or where the identified attorney was merely copied. They claim protection on documents either sent directly or copied to a third-party. Finally, Defendants ignore the rationale of the protections by withholding or redacting hundreds of documents that concern scientific, regulatory, promotional, and/or business issues, none of which are primarily legal in nature.

As the Court has previously noted in its September 26, 2017 hearing, the number of privilege claims makes it extremely difficult for it to review Defendants' claims of privilege. In such instances, "the trend has been to establish categories of documents and rule based on samples of documents within each category . . . . [c]onsiderations of judicial economy certainly support a sampling methodology." EDWARD J. IMWINKELRIED, THE NEW

WIGMORE: A TREATISE ON EVIDENCE: EVIDENTIARY PRIVILEGES § 6.2.3 (Richard D. Friedman ed., Wolters Kluwer Law & Business 2d ed. 2010).

MDL courts in this Circuit and around the country have similarly recognized that a representative *in camera* review is warranted under these circumstances. *See, e.g., Pfizer Inc. v. Ranbaxy Labs. Ltd.*, 2004 U.S. Dist. LEXIS 20948, at *7 (D. Del. Oct. 7, 2004) (MDL court conducting an *in camera* review of a sample of fifteen documents out of several hundred and ordering defendants to produce all withheld documents based on its determination that those fifteen were not sufficiently privileged); *State v. Philip Morris Inc.*, 1998 Minn. Dist. LEXIS 4 (tobacco litigation court conducting a representative sample in camera review and ordering the production of whole categories of documents on that basis); *In re A.H. Robins Co., Inc.*, 107 F.R.D. 2, 14 (D. Kan. 1985) (court supervising MDL Dalkon Shield litigation setting forth a procedure for the determination of privilege by categories or "batches" of documents); *In re Denture Cream Prods. Liab. Litig.*, 2012 U.S. Dist. LEXIS 151014 (S.D. Fla. Oct. 18, 2012) (conducting an *in camera* view of representative samples from various categories of documents, ascertaining privilege claims on that basis); *In re*

*Seroquel Prods. Liab. Litig.*, 2008 U.S. Dist. LEXIS 39467 (M.D. Fla. May 7, 2008) (same).

Given the huge scope of Defendants' claims, and the clear evidence that many simply cannot be privileged, a category, representative sample approach is the only way to adjudicate the numerous claims.

**1. "And Attachments"**

Defendants claim privilege or work product protection on documents simply described as [redacted] Out of the remaining documents in dispute, BMS withholds 203 and OAPI withholds 70 with this description. But, Defendants fail to describe the attachments in any detail, or provide any explanation as to whether the attachments are separately listed on the privilege logs. First, this deficiency is in direct contravention to this Court's February 7, 2017 Order concerning electronically stored information.[17] That Order, in section "1.4 Emails and Attachments," requires that Defendants "produce a log treating each e-mail and attachment withheld *separately*." *Id.* (emphasis added)

[17] February 7, 2017, Order for Preservation and Production of Documents, Electronically Stored Information, and Privileged Documents, ECF # 183, p. 6.

Defendants' deficiency makes it virtually impossible for Plaintiffs to ascertain whether the claim of privilege or work product applies equally to the email as it does to the attachments. Second, the subject matter of the [redacted] is often not legal in nature. For example, OAPI's log claims privilege over [redacted] on such topics as [redacted] One email thread includes an attachment concerning a [redacted] Examples include:

[redacted]

[18] OAPI Ex. 1, OAP-PRIV0000076, p. OAPI-2.
[19] OAPI Ex. 1, OAP-PRIV0000211, p. OAPI-4.
[20] OAPI Ex. 1, OAP-PRIV0000276, p. OAPI-5.
[21] OAPI Ex. 1, OAP-PRIV0000336, p. OAPI-7.

[redacted]

exertion of privilege over [redacted] The topics appear similarly non-legal. Some examples include:

[redacted]

BMS's logs also contains the [redacted] description in connection with emails where scientists simply emailed other scientists, reasoning that the communication was [redacted] For example, BMS's log lists:

[redacted]

[22] OAPI Ex. 1, OAP-PRIV0000380, p. OAPI-9.
[23] BMS Ex. 1, entry 4.
[24] BMS Ex. 1, entries 153-154.
[25] BMS Ex. 1, entry 207.
[26] BMS Ex. 1, entry 463.

[redacted]

Defendants' deficiency runs contrary to Florida federal case law, which states that the litigants who withhold privileged material must provide a log for "*for each separate document*." *Pensacola Beach Cmty. United Church, Inc. v. Nat'l Union Fire Ins. Co.*, 2007 U.S. Dist. LEXIS 16002, at *10 (N.D. Fla. Mar. 7, 2007) (emphasis added). In fact, even if the Court finds that the "parent e-mails themselves were privileged, federal courts generally expect that *attachments*, like earlier strings in e-mail correspondence, need to be treated separately and logged as such[.]" *In re Chevron Corp*., 2013 U.S. Dist. LEXIS 190020, at *16 (D.D.C. April 22, 2013) (emphasis added) (internal citation and quotation omitted).

Defendants' failure to separately log attachments is especially problematic for those entries plagued by other deficiencies, such as when underlying factual material is divulged to an attorney, or when there has been many individuals copied on an email. Indeed, as will be explained in further detail, the attorney-client privilege "only protects disclosure of communications; it does not protect disclosure of the underlying facts by

[27] BMS Ex. 1, entries 172, 247.

those who communicated with the attorney." *Upjohn Co. v. United States*, 449 U.S. 383, 395 (1981). Similarly, when a document is prepared for simultaneous review by both legal and non-legal personnel, it is generally not considered to have been prepared primarily to seek legal advice, and the attorney-client privilege does not apply. *See United States v. Chevron Corp.*, 1996 U.S. Dist. LEXIS 8646, at *6 (N.D. Cal. May 30, 1996). Combined with these other deficiencies, it makes it exponentially more likely that the material logged only as [redacted] are not protected. For the aforementioned reasons, the Court should conduct an *in camera* review of a random selection of [redacted] contained in Exhibit 1, and if warranted, order their production.

**2. Not Authored by, Sent to, or Copied to an Attorney**

Defendants boldly maintain privilege and work product claims over several hundred documents not authored, sent to, or copied to an attorney. For example, Defendant OAPI maintains privilege or work product protection on:

[redacted]

[28] OAPI Ex. 2, OAP_05394321, p. OAPI-6; OAP-PRIV0000338, p. OAPI-26.

Similarly, BMS asserts the protections on documents such as:

The attorney-client privilege protects only communications "from the client to the attorney, and responsive communications from the attorney to the client." *In re Vioxx Prods. Liab. Litig.*, 501 F. Supp. 2d 789, 795 (E.D. La. 2007). Indeed, the Eleventh Circuit requires a party to show, among other things, that "(1) the asserted holder of the privilege is or sought to become

[29] OAPI Ex. 2, OAP_05394858, p. OAPI-9.
[30] OAPI Ex. 2, OAP-PRIV0000237, p. OAPI-22.
[31] OAPI Ex. 2, OAP-PRIV0000339, p. OAPI-26.
[32] OAPI Ex. 2, OAP_05391741, p. 25; OAP_05393262, p. OAPI-27.
[33] OAPI Ex. 2, OAP_05397935, p. OAPI-15.
[34] OAPI Ex. 2, OAP_05400456, p. OAPI-17.
[35] OAPI Ex. 2, OAP_05392646, p. OAPI-26.
[36] BMS Ex. 2, entry 16.
[37] BMS Ex. 2, entries 385, 386, 397.
[38] BMS Ex. 2, entry 212.
[39] BMS Ex. 2, entries 130, 137, 162, p. BMS-11.
[40] BMS Ex. 2, entries 73, 74, 75, 77-80.

a client; [and] (2) the person to whom the communication was made (a) is [the] member of a bar of a court, or his subordinate and (b) in connection with this communication is acting as a lawyer. . . " *United States v. Noriega,* 917 F.2d 1543, 1550 (11th Cir. 1990) (internal citation omitted). Therefore, "documents prepared by non-attorneys and addressed to non-attorneys with copies routed to counsel are generally not privileged since they are not communications made primarily for legal advice." *Neuder v. Battelle Pac. Northwest Nat'l Lab.*, 194 F.R.D. 289, 295 (D.D.C. 2000) (citation omitted). *See also Guzzino v. Felterman*, 174 F.R.D. 59, 61 (W.D. La. 1997) (defendant failed to sustain its burden where a "review of the privilege log yields no evidence that a single one of the withheld documents was authored by an attorney, received by an attorney, or prepared for the purpose of obtaining legal advice from an attorney.").

Nor does the fact that Defendants incant the phrases [redacted] per se make such communications privileged. *See Neuder*, 194 F.R.D. at 295 ("the recitation of the phrase 'confidential and privileged attorney-client communication' is not dispositive in determining whether a document is

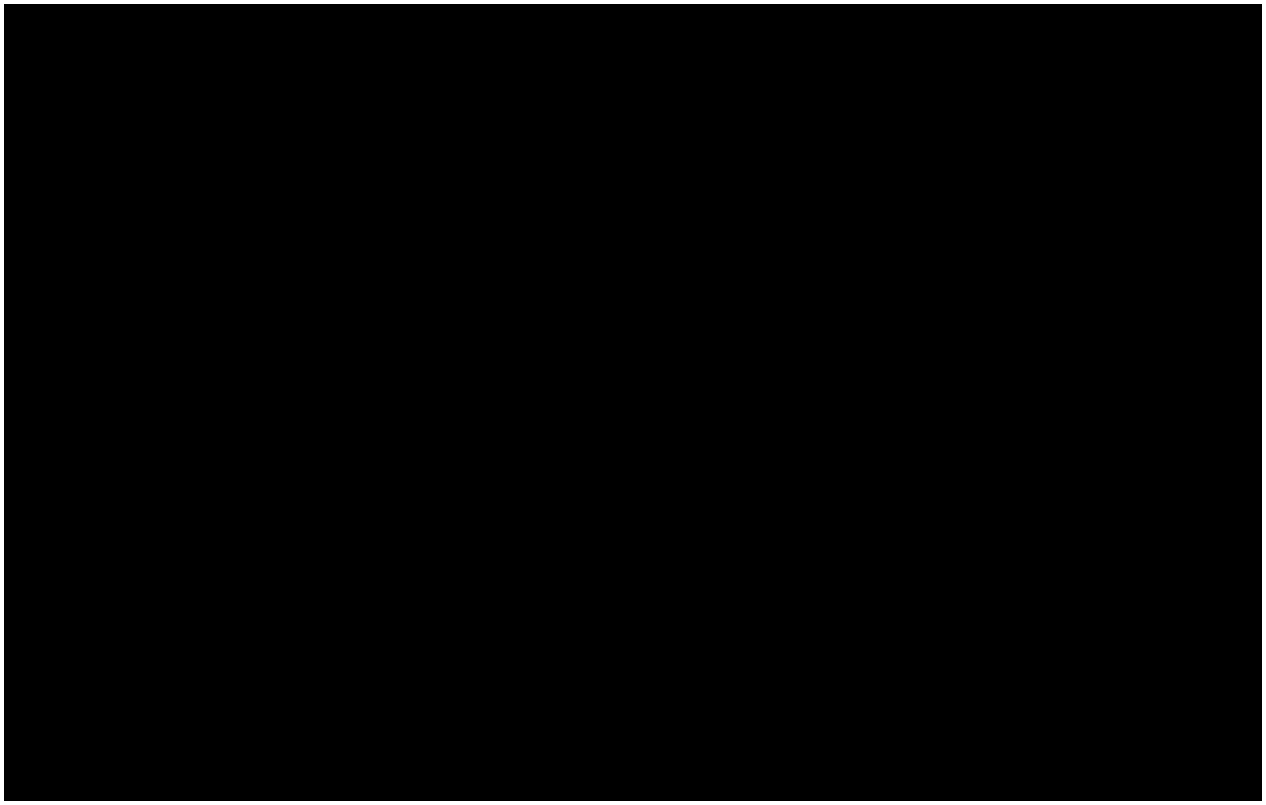
privileged"). Rather, the communication is privileged only if it is a "direct communication" with counsel for "the purpose of obtaining legal advice." *Guzzino*, 174 F.R.D. at 61-62. Thus, communications made for other purposes that may incidentally reflect legal advice are not privileged.

Defendants' claims ignore this fundamental limitation. Exhibit 2 lists the entries from the Defendants' logs that that do not have an attorney as author, addressee, or copyee. The Court should conduct an *in camera* review of these documents and order their production.

**3. Factual Material Created by Non-Attorneys and Provided to Attorneys**

It is well established that 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." *Upjohn Co. v. United States*, 449 U.S. 383, 395 (1981). *See also Bukh v. Guldmann, Inc.*, 2015 U.S. Dist. LEXIS 149756, at *3 (M.D. Fla. Nov. 4, 2015) (same); *Loftin v. Bande*, 258 F.R.D. 31, 36 (D.D.C. 2009) ("attorney-client privilege protects confidential communications between a client and an attorney, not the underlying information itself"). Accordingly, "a party cannot conceal a fact merely by revealing it to his lawyer." *Freiermuth v. PPG Indus., Inc.*, 218

F.R.D. 694, 699 (N.D. Ala. 2003). Defendants repeatedly try to conceal underlying factual information on this basis. For example, BMS claims attorney-client privilege or work product protection on:



OAPI claims privilege on similar types of documents. These include:

[41] BMS Ex. 3, entry 4.
[42] BMS Ex. 3, entry 25.
[43] BMS Ex. 3, entries 50, 52.
[44] BMS Ex. 3, entries 77-80.
[45] OAPI Ex. 3, OAP_PRIV0000050-56, pp. OAPI-5-6.

[redacted]

Obviously, the temptation to avoid disclosure would be too great if a party were able to frustrate discovery by simply giving pre-existing information to its attorneys. Thus, the rule is that "mere transfer of pre-existing reports to an attorney does not invoke the protections of the attorney-client privilege," even "following transfer by the client in order to obtain more informed legal advice." *Adams v. Teck Cominco Alaska, Inc.*, 232 F.R.D. 341, 345 (D. Alaska 2005) (citation omitted). Additionally, non-privileged material does not become privileged merely because an attorney places advice upon it. If it did, companies could manipulate the discovery process by the manner in which their counsel renders advice. *See In re Vioxx Prod. Liab. Litig.*, 501 F. Supp. 2d at 806 ("[Defendant] cannot be permitted to deprive adversaries of discovery by voluntarily choosing to electronically superimpose that legal advice on the non-privileged and, therefore, discoverable communications."). *See also Radiant Burners, Inc. v. American Gas Ass'n*, 320 F.2d 314, 324 (7th Cir. 1963) (the attorney-client

[46] OAPI Ex. 3, OAP_05392695, p. OAPI-20; OAP_05392670, p. OAPI-20.
[47] "Publication policies" concern the development and placement of articles for the public medical literature. It is difficult to see the required nexus to "legal advice."

privilege "would never be available to allow a corporation to funnel its papers and documents into the hands of its lawyers for custodial purposes and thereby avoid disclosure.").

Defendants once again ignore a fundamental limitation by improperly attempting to assert privilege over pre-existing factual documents that were simply transferred to their attorneys. There is no privilege in those circumstances. Plaintiffs have listed the other pre-existing factual documents that were merely transferred to their attorneys on Exhibit 3. The Court should conduct an *in camera* review of the documents and order their production.

**4. Documents with Widespread Distribution to Non-Attorneys, or Merely Copied to Attorneys**

When a document is prepared for simultaneous review by both legal and non-legal personnel, it is generally not considered to have been prepared primarily to seek legal advice, and the attorney-client privilege does not apply. *See Chevron Corp.*, 1996 U.S. Dist. LEXIS 8646, at *6. Thus, when a defendant "simultaneously sends communications to both lawyers and non-lawyers, it usually cannot claim that the primary purpose of the communication was for legal advice or assistance because the

communication served both business and legal purposes." *In re Vioxx Prod. Liab. Litig.*, 501 F. Supp. 2d at 805.

Defendants' logs list many entries that were widely dispersed to persons in multiple departments. Sometimes an attorney is among the authors, addressees, or copyees, but oftentimes not.[48] For example, Defendants withhold or redact documents such as:

[redacted]

[48] [redacted] *See* BMS Ex. 4, entries 24-93, pp. BMS-2-3.
[49] OAPI Ex. 4, OAP_05399158, p. OAPI-8; OAP_05399592, p. OAPI-9; OAP_05399805, p. OAPI-9; OAP_05400240, p. OAPI-9.
[50] OAPI Ex. 4, OAP_05401423, p. OAPI-2.
[51] BMS Ex. 4, entry 2.
[52] BMS Ex. 4, entry 484.

In the *Vioxx* litigation, Merck's attempts to keep such documents privileged failed when Special Master Rice rejected Merck's contention that emails and documents distributed to multiple departments within the company were entitled to privilege protection as part of an alleged "collaborative effort to accomplish a legally sufficient draft." *In re Vioxx Prod. Liab. Litig.*, 501 F. Supp. 2d at 803. Rice decided such widespread distribution destroyed any basis for invoking the protections of the attorney-client privilege, explaining that:

> [T]his "collaborative effort" argument, if successful, would effectively immunize all internal communications of the drug industry, thereby defeating the broad discovery authorized in the Federal Rules of Civil Procedure. This would preclude plaintiffs from discovering communications that might be vital to claims of knowledge, failure to timely warn, and intentional misrepresentations. To permit the attorney-client privilege to have such an impact on the discovery process would be allowing the tail to wag the dog.

*Id.*

Here, Defendants' claims ignore this limitation. Plaintiffs have compiled, in Exhibit 4, a list of documents where a purportedly privileged document was distributed to many non-attorneys, or where the identified attorney was merely copied. The Court should conduct an *in camera* review of the documents and order their production.

**5. Third-Party Waiver**

Several of Defendants' communications were either sent directly or copied to a third-party. Florida courts have stated that such divulgement of privileged materials constitutes a waiver of the asserted privilege. *See, e.g., St. Andrews Park, Inc. v. United States Dep't of the Army Corps of Engineers*, 299 F. Supp. 2d 1264, 1272 (S.D. Fla. 2003) (recognizing that divulging emails between counsel and the client to third parties will waive the attorney-client privilege); *U.S. v. Suarez*, 820 F.2d 1158, 1160 (11th Cir. 1987) (finding that "where there has been a disclosure of a privileged communication, there is no justification for retaining the privilege . . . . it has long been held that once waived, the attorney-client privilege cannot be reasserted.") (internal citations and quotations omitted).

Despite the well-accepted rule, Defendants assert the protections on documents that they have waived by virtue of their disclosure to third-parties. For example, BMS maintains privilege on:

[redacted]

Similarly, OAPI maintains privilege on:

[53] BMS Ex. 5, entries 598-599.

[redacted]

To the extent that Defendants claim that there has been no waiver because the third-parties were retained to prepare for litigation or to retain legal advice, that argument should be rejected. As articulated below, it is well established that communications with public relations consultants are not privileged. *See, e.g., In re Grand Jury Subpoenas,* 179 F. Supp. 2d 270, 291 (S.D.N.Y. 2001) ("[c]ommunications about non-legal issues such as public relations . . . [are] not privileged (or protected by the work product doctrine)."); *In re Grand Jury Proceedings,* 2001 U S. Dist. LEXIS 15646, at *60

[54] OAPI Ex. 5, OAP-PRIV0000144, p. OAPI-1; OAP-PRIV0000145, p. OAPI-2; OAP-PRIV0000146, p. OAPI-2; OAP-PRIV0000147, p. OAPI-2.

[55] [redacted]

[56] OAPI Ex. 5, OAP-PRIV0000212, p. OAPI-5; OAP-PRIV0000213, p. OAPI-5; OAP-PRIV0000216, p. OAPI-5.

[57] OAPI Ex. 5, OAP-PRIV0000237, p. OAPI-6.

[58] OAPI Ex. 5, OAP-PRIV0000340, p. OAPI-9

[59] [redacted]

(S.D.N.Y. Oct. 3, 2001) ("avoid[ing] vilification in the press . . . do[es] not warrant work product protection.").

Defendants have waived their privilege on these documents. The Court should conduct an *in camera* review of documents contained in Exhibit 5 and order their production.

**6. Primary Purpose — Scientific and Product Safety Documents**

Even if a document is prepared by or sent to an attorney, and there has been no third-party waiver, it is not protected unless its primary purpose is to seek or convey legal advice. *See Noriega*, 917 F.2d at 1550 (protected communications must be made for the purpose of "securing primarily either (i) an opinion on the law or (ii) legal services or (iii) assistance in some legal proceeding"); *In re Vioxx Prod. Liab. Litig.*, 501 F. Supp. 2d at 798 (the test "is whether counsel was participating in the communications primarily for the purpose of rendering legal advice or assistance").

Here, Defendants' logs are full of documents that concern [redacted] that generally are not privileged. The broad scope of Defendants' claims over what is not typical legal work raises the same concern Judge Fallon saw in the *Vioxx* case.

There, Judge Fallon's Privilege Master, Paul Rice, recognized that "[t]he structure of Merck's enterprise, with its legal department having such broad powers, and the manner in which it circulates documents, has consequences that Merck must live with relative to its burden of persuasion when privilege is asserted." *In re Vioxx Prod. Liab. Litig.*, 501 F. Supp. 2d at 805. By enlisting its legal department in tasks, or copying it on communications, beyond those typically legal, Merck [and in this case Defendants] could "limit the scope of what adversaries can discover by the way in which it chooses to communicate." *Id.* at 806.

The recruitment of lawyers to do non-legal work is reminiscent of the tobacco industry's unsuccessful attempts to hide damaging scientific and safety information behind privilege. *See United States v. Philip Morris USA, Inc.*, 449 F. Supp. 2d 1 (D.D.C. 2006) (rejecting defendants' attempts to conceal scientific and health research and data behind attorney-client privilege or work product doctrine objections by, for example, having their lawyers exercise "extensive control over joint industry and individual company scientific research," and by having them vet scientific documents). Ultimately, Defendants' logs reveal that many of the emails on which the lawyers are copied, and many of the areas in which they work,

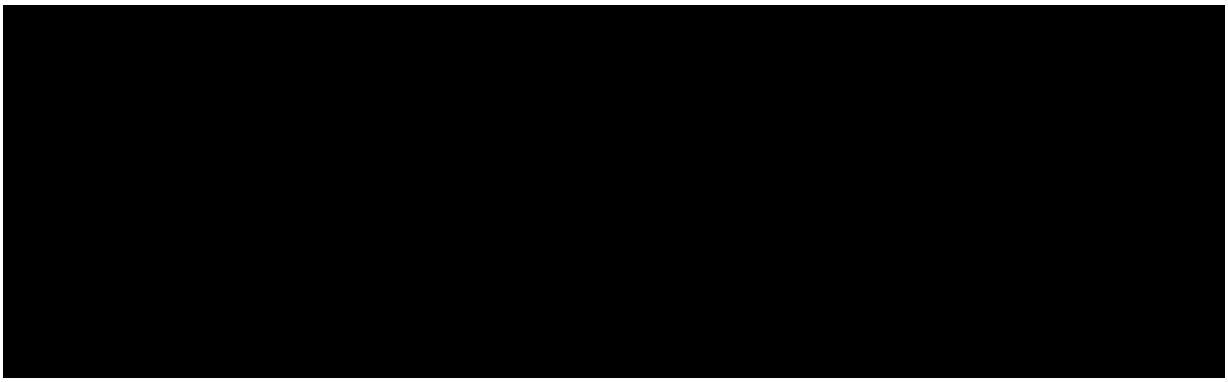
are not the predominantly legal arena in which privilege or work product protection exists.

First, Defendants' privilege logs show heavy attorney involvement in [redacted] Defendants' logs also include communications regarding [redacted] For example, BMS withholds:

[redacted]

[60] BMS Ex. 6, entries 21-23.
[61] BMS Ex. 6, entries 153-154.
[62] BMS Ex. 6, entries 417, 418, 420, 421, 422.
[63] BMS Ex. 6, entry 16.

Similarly, Defendant OAPI withholds:



The safety or scientific research function within a pharmaceutical company simply cannot be delegated to its lawyers in order to cloak the information in privilege. *See Philip Morris USA, Inc.*, 449 F. Supp. at 832. Indeed, many courts have denied privilege claims for such scientific or technical information. *See, e.g., Skyhook Wireless, Inc. v. Google, Inc.*, 2013 U.S. Dist. LEXIS 160261, at *8 (D. Mass. Oct. 30, 2013) ("[l]egal departments are not citadels in which public, business or technical information may be placed to defeat discovery and thereby ensure confidentiality") (internal quotation and citation omitted); *Sky Angel U.S., LLC v. Discovery Come's, LLC*, 28 F. Supp. 3d 465, 485 (D. Md. 2014) ("[a] number of courts have determined that the attorney-client privilege does not protect client

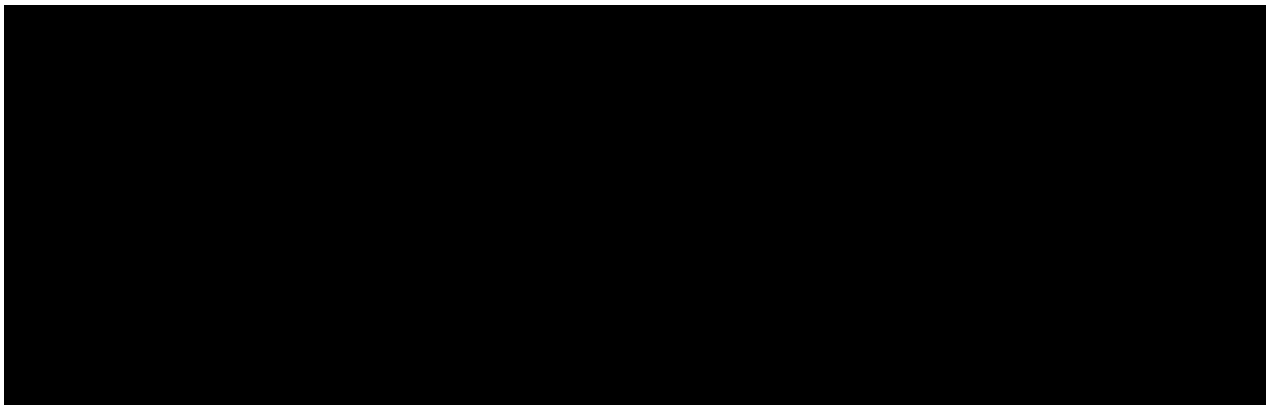
[64] OAPI Ex. 6, OAP-PRIV0000338, p. OAPI-7.
[65] OAPI Ex. 6, OAP_05401501, p. OAPI-2.

communications that relate only to business or technical data") (citing *Simon v. G.D. Searle & Co.*, 816 F.2d 397, 403 (8th Cir. 1987)).

Here, Defendants' claims ignore this well accepted limitation. The Court should conduct an *in camera* review of the documents contained in Exhibit 6 and order their immediate production.

**7. Primary Purpose — Business Records**

OAPI's logs list many communications dealing with business issues that do not appear to be predominantly legal. For example, OAPI withholds:



Documents produced in the routine business of a company do not magically become privileged just because an attorney may be involved. This is true even if the document has some nexus to litigation. *See, e.g., In re*

[66] OAPI Ex. 7, OAP_05389962, p. OAPI-6.
[67] OAPI Ex. 7, OAP-PRIV0000292, p. OAPI-7.
[68] OAPI Ex. 7, OAP_05392695, p. OAP-8; OAP_05392670, p. OAPI-8.
[69] OAPI Ex. 7, OAP_05393398, p. OAPI-8.

*Vioxx,* 501 F. Supp. 2d at 805 ("[w]hen a document is prepared for simultaneous review by non-legal as well as legal personnel, it is not considered to have been prepared primarily to seek legal advice and the attorney-client privilege does not apply") (internal citation omitted); *In re Seroquel Prods. Liab. Litig.,* 2008 U.S. Dist. LEXIS 39467, at *96 (M.D. Fla. May 7, 2008) ("when [a] business simultaneously sends communications to both lawyers and non-lawyers, it usually cannot claim that the primary purpose of the communication was for legal advice or assistance. . .") (internal citation and quotation omitted). Accordingly, the Court should conduct an *in camera* review of the documents contained in OAPI's Exhibit 7 and order their immediate production.

**8. Primary Purpose — Regulatory and Labeling Documents**

Defendants claim privilege over numerous documents whose primary concern is the [redacted] For example, Defendant BMS claims privilege or work product protection on:

[redacted]

[70] BMS Ex. 8, entries 43-44, 82-83, 91-93, pp. BMS-7-8

[redacted]

OAPI similarly claims protection on such documents as:

[redacted]

Many of the documents obviously concern [redacted] Defendants will argue that because it is a giant pharmaceutical manufacturer extensively regulated by the FDA, the scope of the attorney-client privilege is somehow expanded as it pertains to communications with its in-house counsel. Courts have rejected that notion, describing it as "unrealistic" and explaining that regulated entities "cannot reasonably conclude from the fact of pervasive

[71] BMS Ex. 8, entry 2.
[72] BMS Ex. 8, entries 73-80.
[73] OAPI Ex. 8, OAP_05386385, p. OAPI-4.
[74] OAPI Ex. 8, OAP_05398408, p. OAPI-9.

regulation that virtually everything sent to the legal department, or in which the legal department is involved, will automatically be protected by the attorney-client privilege." *In re Vioxx Prod. Liab. Litig.*, 501 F. Supp. 2d at 800-01. This is so because:

> Accepting such a theory would effectively immunize most of the industry's internal communications because most drug companies are probably structured like Merck where virtually every communication leaving the company has to go through the legal department for review, comment, and approval. *The fact that the industry is so pervasively regulated does not justify dispensing with each company's burden of persuasion on the elements of the attorney client privilege.*

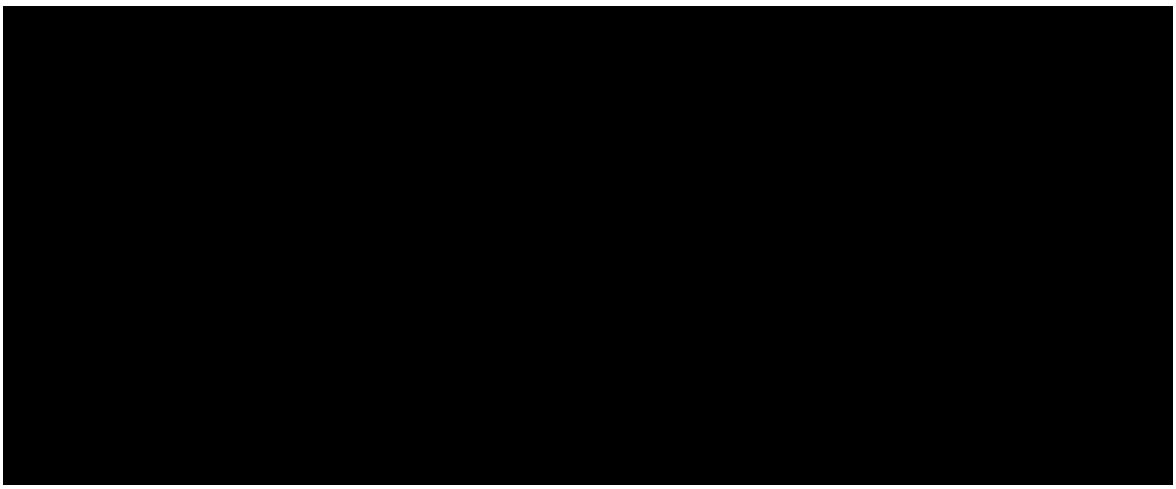
*Id*. at 801 (emphasis added).

Thus, even "pervasively regulated" defendants like Defendants here retain the burden of proving the applicability of the attorney-client privilege or work product protection "on a document-by-document basis." *Id*. Defendants have failed to sustain that burden with respect to the communications at issue here, and the Court should select the documents in Exhibit 8 for an *in camera* review and promptly order their production.

**9. Primary Purpose — Publicity and Promotional Documents**

Many documents on the logs are described as dealing with [redacted] As discussed

briefly above, courts and commentators are skeptical of these types of privilege claims since such communications involve predominantly business advice, which is not privileged. For example, OAPI withholds or redacts documents such as:



In *Freeport-McMoran Sulphur, LLC. v. Mike Mullen Energy Equipment Resource, Inc.*, for example, the court held that neither the attorney-client privilege nor the work product doctrine applied to protect a draft press release that included the handwritten comments of counsel, explaining that such comments "represent no more than marketing advice as opposed to legal advice." 2004 U.S. Dist. LEXIS 10197, at *48 (E.D. La. June 4, 2004). *See also Burroughs Wellcome Co. v. Barr Labs., Inc.*, 143 F.R.D. 611, 615 (E.D.N.C.

[75] OAPI Ex. 9, OAP-PRIV0000350, p. OAPI-16; OAP_05401462, p. OAPI-4.
[76] OAPI Ex. 9, OAP_05399805, p. OAPI-3; OAP-PRIV0000377, p. OAPI-17.
[77] OAPI Ex. 9, OAP-PRIV0000210, p. OAPI-9.
[78] OAPI Ex. 9, OAP_05392723, p. OAPI-15.

1992) (noting that the attorney-client privilege has not been extended to "business advice such as that related to product marketing"); *Calvin Klein Trademark Trust v. Wachner*, 124 F. Supp. 2d 207, 209-10 (S.D.N.Y. 2000) (stating that a "draft press release and accompanying memorandum requesting comments from counsel" prepared by a public relations firm were not privileged where they revealed "neither confidential client communications made for the purpose of seeking legal advice nor attorney work product"); 1 Paul R. Rice, *The Attorney-Client Privilege in the United States* § 7.14, at pp. 7-123 (2d ed. 1999) ("the drafting of a press release is ordinarily performed by a press agent and, therefore, generally would not be considered legal work."). Accordingly, the Court should conduct an *in camera* review of the documents in Exhibit 9 and order their immediate production.

## IV. Conclusion

Defendants' over-broad privilege claims should be rejected. The aforementioned deficiencies touch every single entry and make it virtually impossible for Plaintiffs to ascertain whether a privilege or work product protection has been properly invoked. Based on the aforementioned, Defendants' privilege logs are inadequate on their face and should be

considered waived. In the alternative, this Court should conduct an *in camera* review of a reasonable sample from Exhibits 1-9. Plaintiffs have shown herein many suspicious claims. After its review, the Court should rule that various categories of documents are not protected by the attorney-client privilege or the work product doctrine, and order Defendants to produce the documents from those categories.

Respectfully submitted this 10th day of October, 2017.

*s/ Gary L. Wilson*

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**L.R. 5.1(C) and 7.1 (F) TYPE-SIZE AND WORD COUNT COMPLIANCE CERTIFICATE**

I, Eric M. Lindenfeld, hereby certify that, pursuant to N.D. Fla. L.R. 7.1(F), the attached brief was prepared using Microsoft® Office Word Version 2016, and that its text, exclusive of the case style, signature text, Table of Contents, Table of Authorities and Certificate of Service, contains 7,995 words according to the Microsoft® Word automatic word count function, which has been specifically applied to include all text, including headings, footnotes and quotations. I further certify that the attached brief has a typeface of 14 points in Book Antiqua and complies with N.D. Fla. L.R. 5.1(C).

*s/ Eric M. Lindenfeld*
Eric M. Lindenfeld

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY this 10th day of October, 2017, a true and correct copy of the foregoing was electronically filed and served electronically via the Court's CM/ECF system, which will automatically serve notice to all registered counsel of record.

*s/ Eric M. Lindenfeld*
Eric M. Lindenfeld