UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

CONSERVATION LAW FOUNDATION, INC.,

Plaintiff,

v.

SHELL OIL COMPANY, EQUILON ENTERPRISES LLC D/B/A SHELL OIL PRODUCTS US, SHELL PETROLEUM, INC., SHELL TRADING (US) COMPANY, TRITON TERMINALING LLC, and MOTIVA ENTERPRISES LLC,

Defendants.

Case No: 3:21-cv-00933-SALM

August 24, 2022

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS' MOTION TO COMPEL PLAINTIFF CONSERVATION LAW FOUNDATION, INC.'S RESPONSES TO DEFENDANTS' FIRST SET OF INTERROGATORIES AND REQUESTS FOR PRODUCTION

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INTRODUCTION

Despite litigating this case for over a year, Plaintiff Conservation Law Foundation, Inc. ("CLF") has still not provided Defendants with the factual bases for its allegations and claims in this case. CLF's Amended Complaint ("Complaint") is woefully lacking in specificity. Defendants' pending motion to dismiss raises this lack of factual support, among other flaws in the Complaint. *See generally*, ECF. No. 50-1. Put simply, CLF alleges Clean Water Act ("CWA") and Resource Conservation and Recovery Act ("RCRA") violations, but never sets forth with any degree of specificity *how* CLF contends Defendants violated these statutes. CLF's Complaint alleges in a conclusory manner that the New Haven bulk fuel terminal ("Terminal") at issue in this case is not prepared for future precipitation and flooding risks exacerbated by climate change and includes pages of general information about climate change. But the Complaint is virtually silent when it comes to identifying any actual deficiencies with the Terminal that support these "failure to adapt" claims. *See id*. It is impossible for Defendants to discern what it is that CLF believes is wrong with the Terminal, what specific deficiencies or inadequacies it contends exist, or what aspects of the Terminal's operations are allegedly insufficient to meet the regulatory requirements set forth in Connecticut's General Permit.

Defendants need these basic facts in order to defend this case. Accordingly, Defendants propounded narrowly tailored discovery requests targeted at discovering the factual basis for CLF's allegations in the Complaint. CLF's responses, except in some limited circumstances, essentially refused to respond to these requests, often falling back on objections that these are issues for expert discovery – again leaving Defendants without basic information about CLF's claims. CLF's general objections, including its failure to support its claims of undue burden with any specificity, and refusal to identify the facts underlying its Complaint not only run afoul of

the Federal Rules of Civil Procedure, but have resulted in delay and the expense of litigating this motion.

CLF's unwillingness to provide basic factual information underlying its claims begets the question of whether CLF appropriately investigated its allegations before filing its Complaint.[1] The federal rules require CLF to have had a factual foundation *prior* to filing suit. Litigation is not an opportunity to propound broad discovery requests in an attempt to find factual support for a claim *after* filing a complaint. In contrast to Defendants' narrowly-tailored requests pertaining to this facility and its permit, CLF's First Requests for Production seek unbridled, burdensome discovery about climate change generally and not just the facility at issue, but *all* facilities owned by Defendants and their non-party affiliates around the world (further contributing to the lack of clarity regarding the basis for CLF's allegations concerning this particular terminal – the only facility at issue in this case.) At the same time, CLF refused to answer discovery requests that would reveal the factual support for the suit it filed.[2] Defendants are entitled to know the factual basis for these claims in order to properly prepare witnesses and defend the case, and to meaningfully participate in the Court-ordered settlement conference.

[1] This case is one in a series of nearly identical citizen suits filed by CLF against operators of New England fuel terminals. *Conservation Law Found., Inc. v. ExxonMobil Corp.*, No. 1:16-cv-11950-MLW (D. Mass) (filed Sept. 26, 2016); *Conservation Law Found., Inc. v. Shell Oil Prods. US, et al.*, No. 1:17-cv-396-WES-LDA (D.R.I) (filed Aug. 28, 2017); *Conservation Law Found., Inc. v. Gulf Oil Ltd. P'Ship*, No. 3:21-cv-932-KAD (D. Conn.) (filed July 7, 2021); *see also* Ltr. from Christopher M. Kilian, CLF to Eddie Soberal, Operations Sup., New Haven Terminals, Magellan Midstream Partners, L.P. (July 28, 2020), https://www.clf.org/wp-content/uploads/2020/07/New-Haven-NOI-Letters.pdf, p. 32; Ltr. from Christopher M. Kilian, CLF to Steven Cipullo, Terminal Manager, Sprague Twin Rivers Technology Terminal (May 19, 2021), https://www.clf.org/wp-content/uploads/2021/05/Sprague-TRT-Notice-of-Intent_FINAL.pdf.

[2] CLF's refusal to answer basic questions about its case is a continuing pattern. In response to the mandatory pre-suit notice letter sent by CLF to Defendants, Defendants attempted to engage in pre-suit discussions to identify the deficiencies that CLF contended existed at the New Haven Terminal. CLF never identified any deficiencies in its response and proceeded to file its Complaint, despite Defendants' efforts to understand the basis of the claims and willingness to engage in discussions (as is one of the purposes of the notice requirement for citizen suits).

Through the meet and confer process, the parties were able to narrow the scope of the discovery disputes. CLF has committed to providing responses to many of the requests to which it initially refused to respond, and a privilege log – although Defendants have just received the first such log this afternoon.[3] On other issues, the parties are at a clear impasse. Defendants therefore now move to compel responses to Interrogatory Nos. 2, 12, 13, and 15 and Request for Production Nos. 1, 26, and 33-35. For the reasons discussed below, this Court should grant Defendants' motion to compel in its entirety, thus ensuring Defendants receive the foundational information to defend their case.

BACKGROUND

CLF's lawsuit is a citizen suit brought under the CWA and RCRA. All but three of its fourteen causes of action are CWA claims through which CLF seeks to enforce the terms of Connecticut's General Permit for stormwater discharges that was issued for the New Haven Terminal. Despite the 500-plus-paragraph voluminous Complaint, CLF does not actually aver specific factual allegations supporting CLF's claims that Defendants have violated the CWA or RCRA. *See* ECF No. 50-1.

On February 11, 2022, CLF served its initial disclosures. Ex. A. The initial disclosures did not provide any information regarding who within CLF may have relevant information regarding the facts underlying its Complaint; it only identified five CLF members who are allegedly injured. On May 3, 2022, Defendants served their First Set of Interrogatories ("Interrogatories") and First Set of Requests for Production ("RFPs") (collectively, "Requests") seeking CLF's factual bases for specific allegations in CLF's Complaint. Exs. B, C. Citizen suits

[3] Defendants reserve their rights to challenge the supplemental responses and/or privilege log.

brought under CWA and RCRA are facility-specific and permit-specific, and the Defendants' Requests are targeted at understanding what was allegedly done to violate those statutes.

In its June 9, 2022 Responses to Defendants' First Set of Interrogatories ("Interrogatory Responses") and Responses to Defendants' First Set of Requests for Production of Documents ("RFP Responses") (collectively, "Responses"), CLF raised numerous objections and flatly refused to respond to two Interrogatories and sixteen RFPs. Exs. D, E.

On July 14, 2022, in a good-faith attempt to resolve the discovery disputes, Defendants sent CLF a letter setting forth the deficiencies with CLF's Responses. Ex. F (Ltr. from Megan Morgan, Beveridge & Diamond to Elizabeth Petersen, CLF (July 14, 2022)). On July 21, 2022, Defendants and CLF met and conferred to discuss CLF's objections and lack of responses. Ex. G (Email from Megan Morgan, Beveridge & Diamond to Alexandra St. Pierre, CLF (July 27, 2022)). CLF agreed to reconsider providing responses to eleven of Defendants' Requests. *Id.* Defendants agreed to provide narrower language for two requests, which they provided to CLF on July 27. *Id.* CLF also agreed to confirm in writing that it did not have responsive information to several Requests. *Id.*

On August 5, 2022, CLF sent Defendants a letter responding to the issues and next steps discussed at the July 21 meet and confer. Ex. H (Ltr. from Alexandra St. Pierre, CLF to Megan Morgan, Beveridge & Diamond (Aug. 5, 2022)). In the letter, CLF informed Defendants that an impasse had been reached on several Requests and that it maintained its objections, including those based on associational privilege and work product doctrine, among others. The parties had a meet and confer on August 16 to attempt to resolve outstanding issues. Ex. I (Email from Roy Prather, Beveridge & Diamond to Chance Raymond, Kanner and Whiteley, L.L.C. (Aug. 17, 2022)). Based on representations made by CLF in its August 5 letter and during the August 16

meet and confer describing documents that it agreed to search for and produce, Defendants agreed that a number of requests are no longer in dispute. *Id.* CLF has not yet provided a supplemental production and just only provided a privilege log today, August 24, 2022. Defendants reserved the right to revisit the dispute after reviewing CLF's responsive production and privilege log.[4] *Id.* Pursuant to the schedule set by the Court and according to Federal Rules of Civil Procedure 33, 34, and 37, Defendants file the instant motion to compel proper and sufficient responses to Interrogatory Nos. 2, 12, 13, and 15, and RFP Nos. 1, 26, and 33-35.

LEGAL STANDARD

Rule 26(b)(1) permits parties to "obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case…." Fed. R. Civ. P. 26(b)(1). This scope of discovery also applies to the scope of information that can be asked of a party through an interrogatory or a request for production of documents. *Id.* 33(a)(2); 34(a). If a party provides "an evasive or incomplete disclosure, answer, or response[,]" to an interrogatory submitted under Rule 33 or a request for production served under Rule 34, then the requesting party "may move for an order compelling an answer…." *Id.* 37(a)(3), (4)(a).

In bringing a motion to compel, "'[t]he burden of demonstrating relevance remains on the party seeking discovery,' while 'the party resisting discovery has the burden of showing undue or expense.'" *Brazao v. Pleasant Valley Apartments, LLC*, No. 3:21-cv-1275, 2020 WL 2980842, at *1 (D. Conn. July 28, 2022) (quoting *Bagley v. Yale Univ.*, No. 3:13-cv-01890, 2015 WL 9750901, at *7 (D. Conn. Dec. 14, 2015)). The objecting party must do "more than simply intone the familiar litany that the requests are burdensome, oppressive or overly broad." *Klein v.*

[4] CLF provided a settlement demand on August 3, 2022. After review and comparison to the interrogatory responses, it became apparent that certain responses, which had not been previously discussed during meet and confers, were incomplete. Defendants inquired of CLF whether it intended to supplement its interrogatory responses, and on August 24, CLF replied that it would not supplement. *See* Ex. I.

AIG Trading Grp. Inc., 228 F.R.D. 418, 424 (D. Conn. 2005) (quoting *Compagnie Francaise d'Assurance Pour le Commerce v. Phillips Petroleum Co.*, 105 F.R.D. 16, 42 (S.D.N.Y. 1984)). The objecting party must demonstrate "specifically how, despite the broad and liberal construction afforded the federal discovery rules, each [request] is not relevant or how each question is overly broad, unduly burdensome or oppressive by submitting affidavits or offering evidence revealing the nature of the burden." *Lamoureux v. Genesis Pharmacy Servs., Inc.*, 226 F.R.D. 154, 159 (D. Conn. 2004) (internal citations and quotation marks omitted). The District of Connecticut has overruled objections on the grounds of undue burden for failure to submit affidavits or evidence describing the burden (*e.g.*, "describing the time, resources or costs that would be incurred in order to comply with [the request]"). *Cris v. Fareri*, No. 3:10CV1926, 2011 WL 4433961, at *1 (D. Conn. Sept. 22, 2011).

ARGUMENT

I. CLF'S RESPONSES TO INTERROGATORIES 2, 12, AND 13 ARE INCOMPLETE AND DEFICIENT

- **Interrogatory No. 2: Describe the factual basis for your allegation in paragraph 73 of the Complaint that Defendants have not "designed, maintained, modified, and/or operated its Terminal to account for the numerous effects of climate change." Be specific in Your response, Identifying any relevant Persons and/or Documents Relating to Your response.**
- **Interrogatory No. 12: Describe the factual basis of Your allegation in paragraph 493 of the Complaint that "the Terminal has not been properly engineered, managed, operated, or fortified to protect against the factors discussed in Section IV.A." Be specific in Your response, including how You know the Terminal has allegedly not been properly engineered, managed, operated, or fortified.**
- **Interrogatory No. 13: Paragraph 508 of the Complaint alleges that Defendants have discharged and/or released "hazardous waste" from the Terminal, and "will likely continue to do so due to, including but not limited to, infrastructure failures and inadequate infrastructure design." Describe each and every such discharge or release of "hazardous waste" of which You**

> **are aware and the alleged infrastructure failures and designs to which You refer. Be specific in Your response, including by Identifying dates, locations, witnesses, and any related Persons and/or Documents.**

Defendants propounded Interrogatory Nos. 2, 12, and 13 to understand the facts underpinning core allegations in CLF's Complaint *about the Terminal*. CLF has alleged that Defendants have not "designed, maintained, modified, and/or operated" the Terminal to account for the "effects of climate change." CLF has also alleged that Defendants have not "properly engineered, managed, operated, or fortified" the Terminal to protect against the effects of climate change and that Defendants' alleged prior discharges hazardous wastes "will likely continue" due to "infrastructure failures and inadequate infrastructure design." These allegations are not theoretical, but are purportedly based on facts about the Terminal that CLF investigated and learned, facts that Defendants are attempting to discover with these Interrogatories.

Defendants move to compel complete and full responses to these Interrogatories because the responses provided by CLF are deficient. CLF is under an obligation to provide "answers to interrogatories and production requests [that are] full and complete, not evasive." *Charter Practices Int'l, LLC v. Robb*, No. 3:04–CV–01897, 2014 WL 273855, at *1 (D. Conn. Jan. 23, 2014); *see also Whitserve LLC v. Computer Patent Annuities N. Am., LLC*, No. 3:04–CV–01897, 2006 WL 11273740, at *3 (D. Conn. May 9, 2006) ("The party answering an interrogatory is under an obligation to respond separately, fully and truthfully… answers must be responsive, complete, and not evasive." (internal quotation marks and citations omitted)).

The answers provided by CLF do not meet this standard. In addition to the fact that CLF's responses to each of these Interrogatories are virtually identical (despite the differing subject matter of the requests), CLF's responses are merely a regurgitation of alleged climate change risks, quoting from various publications and studies *but not actually providing any*

details on the Terminal itself. Rather than identify how the Terminal is allegedly inadequately "designed, maintained, modified, and/or operated" or fails to be "properly engineered, managed, operated, or fortified," CLF instead responds that written documents, such as the Terminal's Stormwater Pollution Prevention Plan ("SWPPP"), lack a discussion of climate change risks (which is not a requirement of the permit) and on that basis inadequacies in the Terminal can be *inferred*. *See e.g.*, Ex. D at 49. This answer is not responsive, and, more fundamentally, continues to leave Defendants with no information about what is allegedly wrong with the Terminal. Finally, CLF repeats the same conclusory statements made in the Complaint that the Terminal is not operated, designed, etc. to withstand the effects of "climate change."

Not only are CLF's responses insufficiently responsive to these Interrogatories, but they also appear to be incomplete. Through the exchanges in connection with the Court-ordered settlement conference, Defendants have obtained information from CLF that makes clear they do have information concerning the Terminal's infrastructure (but, for clarity, even this information does not identify any deficiency under the current regulatory requirements that are part of the Connecticut General Permit). CLF should provide complete answers to these requests if it has additional responsive factual information about the Terminal. When asked if CLF will supplement its answers to these Interrogatories in light of this information, CLF responded that it will not because "it was prepared for purposes of settlement discussions" and "reflects expert work product." Ex. I. This is a Catch-22 for Defendants. CLF cannot make allegations in its Complaint that lack factual support, and then when asked for the underlying facts, refuse to provide them. This thwarts the basic purpose of fact discovery. CLF is obligated under the federal rules to provide full and complete responses to these Interrogatories. CLF should be compelled to meet this obligation.

II. DEFENDANTS' INTERROGATORY 15 SEEKING FACTS AND IDENTITIES OF INDIVIDUALS WITH RELEVANT INFORMATION IS PROPER

- **Interrogatory No. 15: "Describe in detail any factual investigations conducted before the filing of Your original complaint (Dkt. 1) Related to the violations of the CWA and RCRA alleged in the Complaint. In Your response, Identify all Persons that had any involvement in such an investigation, and/or Documents created during or resulting from such an investigation."**

Defendants request this Court to compel a response to Interrogatory No. 15, which requests factual information regarding investigations made by CLF before filing the Complaint, including the identity of persons who have knowledge of such investigation. CLF refused to provide any answer to this interrogatory, objecting on the grounds of relevance and work product doctrine, among other objections. First, the information sought by this interrogatory is relevant as it directly goes to what facts support CLF's claims. With respect to CLF's work product doctrine objection, not only does this doctrine not apply to the subject matter of this interrogatory, but even if it does in limited part, it does not permit CLF to wholesale refuse to identify persons with knowledge of relevant information or facts.[5]

A. Interrogatory No. 15 is relevant because it seeks the underlying facts supporting CLF's claims.

Interrogatory No. 15 requests CLF to provide a description of any factual investigation conducted before it filed the Complaint and identify individuals involved in the investigation and documents produced as a result of the investigation. Defendants propounded this interrogatory to understand the factual basis for CLF's claims. CLF objects to providing a response to this interrogatory on the ground "that the information requested is not relevant to the claims and

[5] Defendants have attempted to ascertain the factual support behind CLF's claims in many ways. As described above, in response to Interrogatories 2, 12, and 13, CLF provided identical responses restating general information regarding climate change and its alleged risks to the Terminal, but still failed to provide specificity as to what exactly it alleges should have been done differently at the New Haven Terminal.

defenses in this case." Ex. D at 60. CLF is incorrect. The information responsive to this interrogatory will assist Defendants in understanding what aspects of the Terminal's operation and/or design CLF believes are violative of the CWA or RCRA. For example, if CLF interviewed neighboring property owners about discharges to the harbor, then that witness would have factual information that is squarely relevant to CLF's Complaint. As noted above, the Complaint itself is virtually devoid of specific facts. Defendants are entitled to know the facts upon which CLF bases its claims, and Interrogatory No. 15 seeks precisely that information.

B. The work product doctrine does not protect the identities of responsive individuals or a description of a factual investigation.

CLF improperly refuses to provide a response to Interrogatory No. 15 on the ground that the information is protected by the work product doctrine. The work product doctrine protects from discovery "documents and tangible things that are prepared in anticipation of litigation . . . by or for another party or its representative…." Fed. R. Civ. P. 26(b)(3)(A); *see also Imperati v. Semple*, No. 3:18-cv-01847, 2020 WL 6441007, at *12 (D. Conn. Nov. 3, 2020). CLF bears the burden in asserting the work product doctrine, and CLF must show three conditions: "The material must (1) be a document or a tangible thing, (2) that was prepared in anticipation of litigation, and (3) was prepared by or for a party, or by his representative." *Imperati*, 2020 WL 6441007, at *12 (internal quotation marks and citation omitted). CLF cannot meet that burden because the language of this interrogatory is narrowly tailored to request only the identities of relevant persons and a description of relevant factual investigations regarding the Terminal.

The work product doctrine protects "documents and tangible things" — which does not cover the identity of relevant persons or a description of a party's factual investigation. Since "the work product doctrine is intended only to guard against divulging the attorney's strategies and legal impressions, it does not protect *facts* concerning the creation of work product or *facts*

contained within [the] work product." *Resolution Trust Corp. v. Dabney*, 73 F.3d 262, 266 (10th Cir. 1995) (emphasis added). Even if work product generated during an investigation is protected, "information that is merely factual may not be withheld under the umbrella of work product but must be available, if not through the production of otherwise protectable documents, then through interrogatories or depositions." *Bell v. Pension Comm. of ATH Holding Co., LLC*, 330 F.R.D. 517, 523 (S.D. Ind. 2018).

Defendants are permissibly seeking this factual information through an interrogatory; therefore, "work product does not preclude inquiry into the mere fact of an investigation," as requested under Interrogatory No. 15. *Dabney*, 73 F.3d at 266. Defendants are also entitled to these "underlying facts found within work-product[,]" which include "the identities of interviewees and the facts obtained from interviews that form the basis of the plaintiffs' claims." *United States v. Dean Foods Co.*, No. 10–CV–59, 2010 WL 3980185, at *2 (E.D. Wis. Oct. 8, 2010). This type of information, which this interrogatory seeks, is "routinely sought during discovery" and should be ordered here. *Id*. at 3.

Furthermore, the "mere identity of persons interviewed by [a party] from whom [a party] has taken a statement with respect to matters involved in [the] litigation is not protected by the attorney work product privilege, at least where such persons are limited to those having knowledge of any relevant, discoverable matter." *Wyly Corp. v. Am. Tel. & Tel. Co.*, No. 76-1544, 1980 WL 1803, at *1 (D.D.C. Feb. 14, 1980) (compelling responses to interrogatories that sought the identification of each person interviewed by the party); *see also Holmes v. Quest Diagnostics, Inc.*, No. 11-80567, 2012 WL 13113976, at *9-11 (S.D. Fla. July 12, 2012) (compelling "the names of persons with whom opposing counsel has communicated"). Defendants' interrogatory is not seeking "written statements, private memoranda [or] personal

recollections," but "only…the names of the persons from whom Plaintiff's counsel may or may not have obtained or generated such things." *Holmes*, 2012 WL 13113976, at *9. Because the "requested identities are not work product," *id.*, CLF should be ordered to respond to Defendants' Interrogatory 15.

III. THE WORK PRODUCT DOCTRINE DOES NOT PROTECT FROM DISCLOSURE DOCUMENTS REVIEWED OR RELIED UPON

- **RFP No. 1: "All Documents referenced, reviewed, or relied upon in Your Amended Complaint in this Litigation."**

In response to RFP No. 1, and through the course of multiple meet and confers, CLF agreed to produce the documents "referenced and relied upon" in its Complaint but objected on work product doctrine grounds to producing documents that were considered but not "referenced or relied upon" in the Complaint.[6] Ex. H. As noted above, "[i]n order for a document to qualify as work product, it must have been 'prepared in anticipation of litigation, [and]…by or for a party, or his representative.'" *Strauss v. Credit Lyonnais, S.A.*, 242 F.R.D. 199, 235 (E.D.N.Y. May 25, 2007) (quoting *In re Veeco Instruments, Inc. Sec. Litig.*, No. 06–CV–702, 2007 WL 724555, at *4 (S.D.N.Y. Mar. 9, 2007)). CLF has not provided any explanation how the documents it reviewed while drafting its Complaint were prepared in anticipation of litigation *and* by or for a party or the party's representative. The "'mere incantation' of work product protection is insufficient to establish that protection is warranted.'" *Strauss*, 242 F.R.D. at 235 (quoting *Omega Eng'g, Inc. v. Omega, S.A.*, 98 Civ.2464, 2001 WL 173765, at *3 (D. Conn. Feb. 6, 2001)). CLF will not be able to "'discharge [this burden] by mere conclusory or ipse dixit assertions.'" *Strauss*, 242 F.R.D. at 235 (quoting *von Bulow v. von Bulow*, 811 F.2d 136, 146 (2d

[6] CLF also objected that the request failed to describe the requested documents with "reasonable particularity," arguing that "Broad requests for all documents 'relating to' an allegation in the complaint are not sufficiently specific under Rule 34." Ex. E at 2. This objection is unfounded and CLF clarified during the July 21 meet and confer that it is not withholding documents based on this objection. *See* Ex. G.

Cir. 1987)). Documents reviewed but not relied upon could provide key information for development of Defendants' defense. Such documents could show facts that are contrary to those included in the Complaint or be used disprove CLF's assertions. CLF should be ordered to provide a full response to RFP No. 1, including documents "reviewed" in preparation of the Complaint.

IV. DEFENDANTS' RFPS 33-35 ARE RELEVANT AND DO NOT IMPLICATE THE ASSOCIATIONAL PRIVILEGE

- **RFP No. 33: "All Documents Relating to allocation of Your staff and volunteer resources to Your programs concerning the Terminal, including any reports or summaries of hours spent by staff members on such Terminal-related activities."**
- **RFP No. 34: "All Documents Relating to costs You have incurred attributable to monitoring, investigating, or responding to discharges to the waters that You allege are impacted by the Terminal, including the New Haven Harbor, the Quinnipiac River, and the Mill River."**
- **RFP No. 35: "All Documents Relating to Your budget allocations and incurred costs for the Litigation."**

A. RFP Nos. 33-35 are relevant to CLF's claims and demands for relief.

RFP Nos. 33-35 request information relevant to CLF's claims. In its initial disclosures, CLF states that "it does not seek damages," and that it instead seeks injunctive and declaratory relief, penalties, fees, costs, and "environmental restoration and compensatory mitigation to address the impacts of past violations of the Permit." Ex. A. CLF flatly refuses to provide any documents responsive to these requests, objecting on the grounds, *inter alia*, that the requests are not relevant. But just as CLF would be required to provide a damages analysis (*see* ECF No. 52), Requests 33 and 34 seek information about the relief sought by CLF in this case. Indeed, CLF explicitly states that it seeks compensation for investigations it conducted related to the Terminal. This Court has held that where a "Plaintiff pled attorney's fees as damages, this Court

is persuaded that documents concerning Plaintiff's legal fees arrangement are relevant now to the computation of claimed damages." *Timbie v. Eli Lilly & Co.*, No. 3:08-cv-979, 2009 WL 10676980 (D. Conn. Oct. 16, 2009) (citing the plaintiff's initial disclosures). This rationale holds true for all of the costs CLF has claimed in its initial disclosures: "CLF seeks…an award of CLF's costs, including reasonable investigative, attorney, witness, and consultant fees." Ex. A at 5. CLF has placed these costs at issue in this litigation, and documents pertaining to those costs are relevant and should be compelled at this stage in the litigation. In addition, as Defendants attempt to ascertain the factual basis for CLF's claims, the degree and nature of any investigations of the Terminal or programs, staff, and resources dedicated to the Terminal are also relevant in understanding the universe of relevant documents and information within CLF's possession.

B. The associational privilege does not apply and even if it did, CLF will not be able to demonstrate that the privilege precludes a response.

CLF objects to providing response to RFP Nos. 33-35 on the ground that responsive information is protected by the associational privilege, but the associational privilege is not applicable here. CLF "must make out a prima facie case of how 'discovery requests would interfere with [its] First Amendment activities,' that is, the party must 'articulate some resulting encroachment on [its] liberties' or the liberties of its members." *Edmondson v. RCI Hosp. Holdings, Inc.*, 16-CV-2242, 2018 WL 2768643, at *2 (S.D.N.Y. June 8, 2018) (quoting N.Y. State Nat. Org. for Women v. Terry, 88 F.2d 1339, 1355 (2d Cir. 1989)). The associational privilege protects the disclosure of discovery that "would have the practical effect of discouraging the exercise of constitutionally protected associational rights…." *See Sexual Minorities of Uganda v. Lively*, 2015 WL 4750931, at *3 (D. Mass. Aug. 10, 2015) (internal citation and quotation marks omitted). However, for the privilege to apply in the first instance,

the information must concern the organization's members. *See, e.g.*, *id.* at 3 ("Information that may be privileged on the basis of associational rights includes identities of rank and file members and similarly situated individuals."); *see also Edmondson*, 2018 WL 2768643, at *2 (requiring "harassment of members due to their associational ties,…harassment directed against the organization itself, [or a] pattern of threats or specific manifestations of public hostility"). Request Nos. 33-35 do not request documents that reveal the organization's members: Request No. 33 requests the allocation of staff and volunteer resources to relevant programs, Request No. 34 concerns costs for relevant activities, and Request No. 35 seeks budget allocations and incurred costs for this litigation. CLF will not be able to show how the associational privilege applies to these requests.

Even if the associational privilege were to apply, the privilege is not absolute. As the party objecting to discovery and the one claiming the privilege, CLF bears the burden to demonstrate that it is entitled to that privilege. *See Sherwin-Williams Co. v. Spitzer*, No. 1:04CV185, 2005 WL 2128938, at *5 (N.D.N.Y. Aug. 24, 2005). To make a *prima facie* case of the associational privilege, CLF must "demonstrate that enforcement of the discovery requests will result in (1) harassment, membership withdrawal, or discouragement of new members, or (2) other consequences which *objectively* suggest an impact on, or 'chilling' of, the members' associational rights." *Sexual Minorities of Uganda v. Lively*, 2015 WL 4750931, at *3 (D. Mass. Aug. 10, 2015) (quoting *Perry v. Schwarzenegger*, 591 F.3d 1147, 1160 (9th Cir. 2010) (emphasis added)). CLF cannot meet this standard. CLF's objection is a mere invocation of the privilege without any further explanation or discussion as to how it applies. *See Edmonson*, 2018 WL 2768643, at *2 (stating that the associational privilege "encroachment cannot be merely speculative"); *Sherwin-Williams Co.*, 2005 WL 2128938, at *5 (remarking that "the association

privilege cannot be used to circumvent general and legitimate discovery where the specter of intimidation and reprisal is not present").

Providing documents responsive to RFP Nos. 33-35 will not objectively interfere with any associational rights, especially since the responses do not need to reveal the members' identities. Should relevant documents include names of members (other than the members that CLF puts forth as standing witnesses), CLF is free to redact names or include a "Confidential" designation. Any potential threat to the associational privilege is mitigated by the presence of the Standing Order, which prohibits documents designated "Confidential" from disclosure outside the parties. *See Edmondson*, 2018 WL 2768643, at *2 (finding "no reason to believe that Defendants' customer lists will become public or expose the customers to reputational harm" due to the presence of a protective order).

C. The attorney-client privilege and work product doctrine do not protect documents responsive to RFP No. 34.

CLF also objects to RFP No. 34 on the grounds of the attorney-client privilege and work product doctrine, but these objections are improper since the documents likely responsive to this request are not protected from disclosure. To the extent that any documents are indeed protected by the attorney-client privilege and work product doctrine, CLF has waived that privilege with respect to documents relevant to the costs it claims as damages. *See Luna v. Sears Life Ins. Co.*, No. 06CV2653, 2008 WL 2484596, at *1 (S.D. Cal. Jan. 11, 2008) ("The documentation supporting the damages claimed is not privileged. Plaintiff cannot request attorneys' fees and simultaneously argue the information supporting the claim is protected. By requesting the fees as damages, Plaintiff put them at issue and waived the claim of privilege."). With respect to documents that are not relevant to CLF's damages, CLF has an obligation to produce a privilege log so that Defendants can assess the privilege asserted over the withheld documents.

RFP No. 34 requests the documents pertaining to costs incurred for monitoring, investigating, or responding to discharges from the terminal. In order for the attorney-client privilege to apply, CLF has the burden to establish that the document contains "legal advice…from a professional legal advisor in his capacity as such" and the communication was "made in confidence…by the client[.]" *Schanfield v. Sojitz Corp. of Am.*, 258 F.R.D. 211, 214 (S.D.N.Y. 2009) (quoting *United States v. Int'l Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of Am., AFL-CIO*, 119 F.3d 210, 214 (2d Cir. 1997)) (internal quotation marks and omitted). To the extent any of these documents concern attorneys' fees, "[t]he fee arrangements between attorney and client do not ordinarily constitute a confidential communication and, thus, are not privileged in the usual case." *Montauk U.S.A., LLC v. 148 S. Emerson Associates, LLC*, No. CV 17-4747, 2019 WL 254039, at *2 (E.D.N.Y. Jan. 17, 2019) (collecting cases) (internal quotation marks and citation omitted); *see also United States v. Rader*, 1980 WL 1634, at *3 (D. Conn. Jan. 17, 1980) ("Court have held on numerous occasions that statements of legal fees and expenses are not protected."). CLF has not provided any explanation for how responsive documents are protected by the attorney-client privilege for this request.

Similarly, as discussed above, CLF "likewise bears the 'heavy burden' of establishing the applicability of the work product doctrine." *Schanfield*, 258 F.R.D. at 214. Specifically, CLF must show that the "document or communication…[was] prepared in anticipation of litigation by or for a party, or by his representative." *Id.* CLF has not provided any explanation for how it is entitled to keep from disclosure documents on the ground of the work product doctrine either.

V. CLF IMPROPERLY OBJECTS ON PRIVILEGE GROUNDS AND REFUSES TO PROVIDE A PRIVILEGE LOG

- **RFP No. 26: All Documents provided to and Communications with Your Board of Directors Relating to this Litigation**

CLF has refused to even *search* for documents responsive to this request for relevant information, objecting on several grounds, including the work product doctrine, attorney-client privilege, and associational privilege. Ex. D. The request is relevant and narrowly tailored, seeking communications with a limited number of people that are specifically related to the litigation.

Nothing about this request is inherently privileged. Communications from CLF staff to the board of directors that do not include counsel or do not discuss advice from counsel are not privileged. There are responsive documents that may be privileged, but if so, CLF should search for them and provide a privilege log so that Defendants can assess the privilege claim. As described further above, if invoking attorney-client privilege or the work product doctrine, it is CLF's burden to describe, for each document, how those privileges apply. *See supra* II.B. (work product) and IV.C (attorney-client privilege). As for CLF's associational privilege objection, the request does not directly implicate CLF's members, and, again, CLF bears the burden of demonstrating that the associational privilege applies and precludes a response. *See supra* IV.B.

CLF improperly makes a blanket statement that all documents responsive to this request are "primarily or exclusively" subject to its privilege objections, while at the same time stating that it will not even search to see what documents exist. Ex. I (Email from Allison Brouk, Kanner & Whitely, L.L.C. As discussed further below, without conducting any search, CLF cannot support its objection that the request is overly broad and unduly burdensome. This Court should compel CLF to respond to this request and appropriately log any privileged documents.

VI. CLF HAS NOT DEMONSTRATED RESPONDING TO REQUESTS IS AN UNDUE BURDEN

CLF objects to Interrogatory Nos. 13, and 15 and RFP Nos. 1, 26, and 33-35 on the basis that they "unduly burdensome. However, CLF has not provided any specific information explaining why or how responding to Defendants' Requests is too burdensome or how the relevance of these Requests is outweighed by the burden to respond to them.

Under Rule 26(b)(1), Defendants are entitled to "obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case…." Fed. R. Civ. P. 26(b)(1). Part of that proportionality consideration is "whether the burden or expense of the proposed discovery outweighs its likely benefit." *Id.* "'[T]he party resisting discovery has the burden of showing undue burden or expense.'" *Brazao*, 2022 WL 2980842, at *1 (quoting *Bagley* 2015 WL 8750901, at *7). "To resist relevant discovery on grounds of undue burden, a party must ordinarily demonstrate that burden with an affidavit or other proof." *Doe v. Wesleyan Univ.*, 2021 WL 4704852, at *4 (D. Conn. Oct. 8, 2021). And specifically, CLF must show how "'*each* interrogatory is not relevant or how each question is overly broad, burdensome or oppressive…by submitting affidavits or offering evidence revealing the nature of the burden.'" *Id.* (quoting *Pegoraro v. Marrero*, 281 F.R.D. 122, 128-29 (S.D.N.Y. 2012)).

CLF fails to make a showing of undue burden. For example, RFP No. 1 requests all documents that were "referenced, reviewed, or relied upon" in CLF's Complaint. Relevance is directly tied "any party's claim or defense." Fed. R. Civ. P. 26(b)(1). While CLF has agreed to produce the documents that are referenced and relied upon in the Complaint, it continues to object to providing documents that were reviewed, but not referenced or relied upon in drafting the Complaint. Defendants' RFP No. 1, as well the others, are narrowly tailored to seek the most

relevant of information that CLF uses for the critical allegations of its claims. In addition to the objections based on the work product doctrine and "reasonable particularity," discussed above, CLF objects that the request is "overly broad [and] unduly burdensome" without providing any specificity to support this objection. Similarly, CLF's response to RFP No. 26 states that CLF will not even search for relevant documents. It is inconsistent for CLF to also argue that the request is unduly burdensome when it has not even looked at the world of possibly responsive documents to evaluate the potential burden, and where the parties' ESI agreement specifically states that communications involving litigation counsel that post-date the notice letter do not need to be logged. Without providing any evidence of the nature of this alleged burden, this objection should be overruled.

A party cannot refuse to provide the highly relevant facts upon which it bases its claims in its complaint on the ground that to do so would be too burdensome, particularly without any specific information substantiating such objection. *Vidal v. Metro-North Commuter R. Co.*, No. 3:12CV248, 2013 WL 1310504, at *1 (D. Conn. Mar. 28, 2013) ("'Boilerplate objections that include unsubstantiated undue burden, overbreadth and lack of relevancy,' while producing 'no documents and answering no interrogatories…are a paradigm of discovery abuse.'" (quoting *Jacoby v. Hartford Life & Accident Ins. Co.*, 254 F.R.D. 477, 478 (S.D.N.Y. 2009)). In its responses to Interrogatory Nos. 13, and 15, and RFP Nos. 33-35, CLF similarly objects that the requests are "overly broad [and] unduly burdensome" without any specification or detail on the nature of the burden. Further, the information sought in these Requests should have been developed or investigated prior to filing this suit, meaning it should be readily accessible to CLF. For these reasons, CLF will not be able to show that responding to Defendants' Requests is not proportional to the needs of this case.

CONCLUSION

For the foregoing reasons, Defendants respectfully request that the Court grant Defendants' Motion to Compel Responses to Defendants' First Set of Interrogatories and First Set of Requests for Production with respect to Interrogatory Nos. 2, 12, 13, and 15 and RFP Nos. 1, 26, and 33-35, as well as reasonable costs incurred in litigating this motion, to the extent permitted under Federal Rule of Civil Procedure 37(a)(5).

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on August 24, 2022, the foregoing Memorandum of Law in Support of Defendants' Motion to Compel Plaintiff Conservation Law Foundation, Inc.'s Responses to Defendants' First Set of Interrogatories and Requests for Production was filed through the Court's electronic filing system ("ECF"), by which means the document is available for viewing and downloading from the ECF system and a copy of the filing will be sent electronically to all parties registered with the ECF system.

/s/ Megan L. Morgan

Megan L. Morgan