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., TRITON TERMINALING LLC, and MOTIVA ENTERPRISES LLC, *Defendants*.	Civil Action No. 3:21-cv-00933-JAM

PLAINTIFF CONSERVATION LAW FOUNDATION'S
MOTION TO COMPEL AND ACCOMPANYING MEMORANDUM OF LAW

EXHIBIT LIST

I. INTRODUCTION

Plaintiff Conservation Law Foundation, Inc. ("CLF" or "Plaintiff") files this Motion to Compel under Rule 37 of the Federal Rules of Civil Procedure against Defendants Shell Oil Company ("Shell USA"), Equilon Enterprises LLC d/b/a Shell Oil Products US ("Equilon"), Shell Petroleum, Inc., Triton Terminaling LLC ("Triton"), and Motiva Enterprises LLC ("Motiva"), collectively referred to in this Motion as "Defendants."[1] CLF filed its first motion to compel on July 27, 2022 regarding Defendants' objections to producing information relevant to CLF's Clean Water Act and Resource Conservation and Recovery Act claims. *See* ECF 84. The Court dismissed the motion without prejudice on August 15, 2022 to allow for the deposition of James Kent Yeates, a witness Defendants offered as an alternative to resolving CLF's motion. *See* ECFs 96, 98. CLF then deposed Mr. Yeates and filed a renewed Motion to Compel on January 20, 2023 to address Defendants' failure to comply with the Federal Rules of Civil Procedure during discovery and their refusal to produce documents and information relevant to the claims and defenses at issue in this case. ECF 149. A hearing was held on this motion on March 24, 2023. ECF 198.

CLF's Renewed Motion to Compel also asks this Court to hold that Defendants waived any claim of privilege by failing to timely provide a privilege log as required by local rules.[2] *See* ECF 149 at 28–30. At the time CLF filed its Reply brief in support of its Motion to Compel, ECF 191, Defendants had not provided a privilege log; however, hours after CLF filed its Reply, Defendants emailed CLF a copy of their privilege log. Ex. B, Feb. 24, 2023 Email; Ex. C, Privilege

[1] CLF's Local Rule 37(a) Affidavit is attached hereto as Exhibit A.

[2] Because the issue of waiver is before the Court in CLF's Motion to Compel, CLF does not raise the issue separately in the instant Motion so as not to burden the Court with duplicative arguments; however, CLF believes that Defendants' nearly two-month delay constitutes a waiver of any privilege.

Log. This Motion seeks to compel Defendants to produce information and documents that are being withheld under claims of privilege because Defendants have not met their burden to support the existence of a privileged attorney-client communication.

II. BACKGROUND

CLF has already briefed much of the relevant history regarding Defendants' document productions and failure to timely produce a privilege log. *See* ECF 149 at Section II. As indicated above, CLF did not receive Defendants' privilege log until after briefing on CLF's Renewed Motion to Compel was complete. CLF then wrote Defendants and identified numerous deficiencies in the privilege log. Ex. D, Mar. 17, 2023 Ltr. CLF explained that Defendants privilege log did not provide sufficient information to allow CLF to determine whether the attorney-client privilege applies and that, in fact, it appears the privilege did not apply for several entries. *Id.*

One glaring deficiency, critical to this Motion to Compel, is that Defendants did not identify which custodians, authors, or recipients of the logged documents are employed by which (if any) of the Defendants. Instead, Defendants' privilege log only listed "Shell" as an individual's employer and failed to identify any job titles. However, "Shell" is not a Defendant in this case, nor, as Defendants have oft repeated, is "Shell" a legal entity. *Id*. at 2–3. The second major deficiency is that the privilege log lists communications and documents where Defendants asserted the attorney-client privilege without identifying any attorney (designated by a "*") as a custodian, author, or recipient. *Id.* at 3. Thus, any privileged attorney-client communication appears to have been waived since the initial (presumptive) attorney-client communication was included in a secondary communication. *Id.*

Defendants responded to CLF's letter on March 22, 2023, mere hours before the Parties had scheduled a meet and confer. Ex. E, Mar. 22, 2023 Ltr. Regarding the use of "Shell" to

identify employers, Defendants asserted, without citing any case law or rule of civil procedure, that the "specific employer or job title of individuals listed on the privilege log is not determinative of whether the entries are privileged nor was this required field within the Joint ESI Agreement." *Id.* at 2. Defendants further stated that although some entries are not under the direct custody of an attorney or directly authored by an attorney, the "entries contain privileged communications from Defendants' attorneys and such information is being relayed among the attorneys' client personnel or its agents." *Id.* at 2–3.

Ultimately, the Parties agreed they were at an impasse regarding the issue of waiver, whether the privilege log entries provide sufficient information to allow for a meaningful review of Defendants' assertions of privilege, and agreed that the Parties had fully met and conferred on the issues raised in CLF's March 17, 2023 correspondence. Ex. F, Mar. 23, 2023 Email.

III. ARGUMENT

CLF once again asks this Court to compel Defendants to comply with their discovery obligations, this time because Defendants have produced an inadequate privilege log that fails to provide CLF (and this Court) with sufficient detail to meaningfully review Defendants' claims of privilege and which also fails to meet Defendants' burden to demonstrate the attorney-client privilege applies to the withheld information.

A. Defendants' Privilege Log Does Not Allow for Meaningful Review of its Privilege Claims.

The party asserting attorney-client privilege must provide sufficient detail in a privilege log to allow for a meaningful review of the privilege asserted. *Bolorin v. Borrino*, 248 F.R.D. 93, 95 (D. Conn. 2008); *see also* ECF 113 ("[W]hatever the form, the [privilege] log must provide enough information to permit the [opposing party] (and, if necessary, the Court) to assess the privilege claim."). A privilege log is "adequately detailed if, as to each document, it sets forth

specific facts that, if credited, would suffice to establish each element of the privilege or immunity." *Safeco Ins. Co. of Am. v. M.E.S., Inc.*, 289 F.R.D. 41, 47 (E.D.N.Y. 2011) (quotation marks omitted). Thus, logs are routinely found to be deficient when the details provided do not allow for a purposeful review of the claimed privilege. *See, e.g.*, *Bolorin*, 248 F.R.D. at 95 ("The privilege log tells the court that the defendants communicated with individuals ... regarding the case, but the court cannot determine from the record before it whether these were confidential communications between an attorney and client made in confidence for the purpose of providing legal advice."); *United States v. Constr. Products Research, Inc.*, 73 F.3d 464, 473–74 (2d Cir. 1996) (finding a log deficient where it generally alleged attorney-client communications without giving more information to support the claim, such as a specific explanation of why the document is privileged).)

Defendants' privilege log makes it impossible for CLF or the Court to meaningfully review Defendants' privilege claims. As noted below, an essential element of the attorney-client privilege is the existence of an attorney-client relationship. Here, by merely indicating that individuals listed in the privilege log are employed by "Shell" or are in-house counsel for "Shell," Defendants have failed to provide information that would allow CLF to determine whether an attorney-client relationship existed in the first place, and if so, whether it extends to any *Defendant*. *See* Ex. C, Entries 1–11, 13–15.[3] Indeed, Defendants' privilege log fails to list *any* Defendant by name. CLF cannot meaningfully review any of Defendants' assertions of privilege without information about each Defendants' connection to the purported attorney-client communication. *See Wanzer v. Town of Plainville*, 2016 WL 1258456 * 3 (D. Conn. 2016) ("[W]hile the log indicates when an author

[3] Defendants stated that they would provide an updated privilege log to correct a "typo" regarding entry 12, which incorrectly lists Marco Fantolini (no employer identified) as the custodian of a privileged document. Ex. E, Ltr. at 2. Defendants have not provided the updated privilege log at the time of this filing.

or recipient of an email is an attorney, it does not relate the role or title of the other individual(s) named.").

B. Defendants Have Not Met Their Burden to Establish Attorney-Client Privilege.

The burden of establishing the applicability of the privilege rests with the party invoking it. *United States v. Adlman*, 68 F.3d 1495, 1500 (2d Cir. 1995). That burden is "not discharged by mere conclusory or ipse dixit assertions." *In re Grand Jury Subpoena Dated Jan. 4, 1984*, 750 F.2d 223, 224–25 (2d Cir. 1984) (quotation marks and citations omitted). The invoking party must show (1) a communication between client and counsel that (2) was intended to be and was in fact kept confidential, and (3) was made for the purpose of obtaining or providing legal advice. *In re County of Erie*, 473 F.3d 413, 419 (2d Cir. 2007).

The invoking party also has the burden to show the privilege has not been waived. *In re Signet Jewelers Limited Securities Litig.*, 332 F.R.D. 131, 135 (2019). "[D]isclosure to a third party by the party of a communication with his attorney eliminates whatever privilege the communication may have originally possessed." *In re* Horowitz, 482 F.2d 72, 81 (2d Cir. 1973). It is "vital to a claim of privilege that the communications between client and attorney were made in confidence and have been maintained in confidence." *United States v. Mejia*, 655 F.3d 126,134 (2d Cir. 2011). Courts in the Second Circuit apply the privilege "only where necessary to achieve its purpose and construe the privilege narrowly because it renders relevant information undiscoverable." *Mejia*, 655 F.3d at 132 (quotation marks and citations omitted).

1. Defendants Have Not Met Their Burden to Establish the Existence of an Attorney Client Privilege for Any Document Listed on their Privilege Log.

Defendants' privilege log fails to identify which of the "Shell" entities—*including which Defendants*—were involved in any aspect of the allegedly privileged communications identified in their log. Without this most basic information, Defendants have failed to identify who is the

client and who is the attorney and have therefore failed to meet their burden to demonstrate the existence of an attorney-client privilege. Defendants have consistently argued that there is no "Shell" entity in this litigation and they are defending this case on the premise of the distinct and separate existence of each corporate Defendant. Yet here they ignore their corporate separateness in an apparent attempt to assert the attorney client privilege throughout "Shell."

2. Defendants Have Not Met Their Burden to Show Communications Between In-House Counsel and Employees of Separate "Shell" Corporations are Privileged.

Even assuming the "Shell" label refers to one or more of the Defendants in this case, Defendants have failed to meet their burden that communications between "Shell" in-house counsel and "Shell" employees are privileged.

Each of the attorneys listed in Defendants' privilege log are identified only as in-house counsel for "Shell." *See* Ex. C at Log Nos. 2, 3, 5–11, 13–15. The remaining entries note the document contained legal analysis or research (Log Nos. 1, 12) or indicate the documents contain communications with in-house counsel (Log No. 1, 4).[4] However, when supposedly privileged communications cross corporate boundaries within the same corporate family, courts will require a "showing that a common attorney was representing both corporate entities or that the two corporations shared a common legal interest." *In re Keurig Green Mountain Single-Serve Coffee Antitrust Litig.*, No. 14MD2542VSBHBP, 2019 WL 6736132, at *9 (S.D.N.Y. July 22, 2019), *report and recommendation adopted*, No. 14MD2542VSBHBP, 2019 WL 4359551 (S.D.N.Y. Sept. 12, 2019) (citing *Bowne of N.Y.C. Inc. v. AmBase Corp.*, 150 F.R.D. 465, 491

[4] Log No. 4 also fails because the purportedly confidential attorney-client communications were disclosed to a third party. *See* Section I.A. 5. below.

(S.D.N.Y. 1993).[5] "[T]reating members of a corporate family as one client fails to respect the corporate form." *In re Teleglobe Commc'ns Corp.*, 493 F.3d 345, 371 (3d Cir. 2007), *as amended* (Oct. 12, 2007).

Here, Defendants refused to identify which "Shell" corporation employs any of the in-house counsel or other individuals listed in their privilege log, let alone make the required showing for communications among related corporate entities. Defendants respond that a person's job title and employer are not "determinative" on the question of privilege. Ex. E, March 22, 2023 Ltr. at 2. But even if not determinative, such information is certainly both relevant and necessary to determine the applicability of any claim of privilege. Therefore, each of the privilege log entries listed above referencing "Shell" in-house counsel and employees of "Shell" fail to meet Defendants' burden to demonstrate the existence of the attorney-client relationship.

3. Defendants Have Failed to Meet Their Burden that Communications with In-House Counsel and Employees of the Same Corporation are Privileged.

Even assuming each of the "Shell" employees works for the same corporation as the "Shell" in-house counsel, Defendants have still failed to meet their burden to support a claim of privilege. Not all communications with in-house counsel and employees of the same corporation are privileged.

First, "in-house counsel often fulfill dual roles of legal consultant and business advisor. Communications that principally involve the performance of non-legal functions by inhouse counsel are not protected." *Vidal v. Metro-N. Commuter Ry. Co.*, No. 3:12CV0248 MPS WIG, 2014 WL 413952, *5 (D. Conn. Feb. 4, 2014). "Even if a business decision can be viewed as containing both business and legal evaluations, the business aspects of the decision are not

[5] While *Bowne* applied New York rather than federal law, New York and federal law on attorney-client privilege is "quite indistinguishable." *In re Keurig*, 2019 WL 6736132 at n.10 (quoting *NXIVM v. O'Hara*, 241 F.R.D. 109, 124 (N.D.N.Y 2007).

protected simply because legal considerations were also involved." *Id.* Courts consider whether the "predominant purpose of the communication is to render or solicit legal advice." *In re Cnty. of Erie*, 473 F.3d 413, 420 (2d Cir. 2007). Here, assuming each entry involves a communication between client and counsel and was made in confidence, it is unclear that each entry was made for the predominant purpose of seeking legal advice.

Second, not every employee of a particular "Shell" corporation is the "client" of that corporation's in-house counsel. "In order to preserve the privilege, disclosure within the corporate ranks must be limited to employees who are in a position to act or rely on the legal advice contained in the communications, or who share responsibility for the subject matter underlying the consultation." *Compass Prods. Int'l LLC v. Charter Commc'ns, Inc.*, No. 18CV12296VMBCM, 2020 WL 3448012 (S.D.N.Y. June 24, 2020) (internal quotations omitted). The entries on the privilege log include communications with numerous recipients—one entry, Entry No. 9, lists upwards of 20 people. Defendants have not provided any information about the "Shell" employees identified in the privilege log who received the allegedly privileged information, including their job titles or employers, and therefore have not met their burden to demonstrate each recipient was within the scope of the corporation's attorney-client privilege.

4. Communications That Do Not Involve an Attorney are Not Privileged.

Entry No. 1 describes a series of emails "containing discussion of legal research conducted for in-house counsel concerning the terminal's hazardous waste." Ex. C at 1. However, Entry No. 1 does not list any attorney as a custodian, author, or recipient of the emails. *Id.* None of the individuals listed are identified as being in-house counsel and the subject of the emails are "JLB Update Week of 10/12/18; JLB Update 10/19/18." Presumably JLB refers to Jennifer Bothwell, who CLF understands is not an employee of any of the Defendants and is not an attorney. Thus, these communications are not privileged because they do not involve an attorney. Similarly, Entry

Nos. 4 and 12 fail to identify any attorney as a custodian, author, or recipient of those records and therefore privilege does not attach.[6]

Defendants suggest that entries not under the direct custody of an attorney or directly authored by an attorney are nevertheless privileged because they "contain privileged communications from *Defendants'* attorneys and such information is being relayed among the attorneys' client personnel or its agents." Ex. E, Mar. 22, 2023 Ltr. at 2–3 (emphasis added). However, Defendants' privilege log does not identify any of the listed in-house counsel as an attorney of a *Defendant* or provide information that the recipients of the relayed information were in fact that attorney's client personnel or its agents. Again, Defendants have not met their burden.

5. Sharing Privileged Communications with Third Parties Waives Privilege.

Defendants' privilege log Entry No. 4 demonstrates that the withheld information is *not* privileged. "[A]s a general matter the attorney-client privilege applies only to communications between lawyers and their clients . . . ." *Mejia*, 655 F.3d at 132; *In re County of Erie*, 473 F.3d at 419 (stating communication must be kept confidential). Entry No. 4 describes communications involving a third party – Sovereign Consulting ("Sovereign"). Ex. C at 1. Assuming there was an attorney-client communication, whatever protection it may have been afforded was lost when shared with third-party Sovereign.

[6] Defendants also claim that Entry No. 12 is protected by the work product doctrine. However, they offer no information to support the claim of work product. Like the attorney-client privilege, the party asserting protection under the work product doctrine has the burden of demonstrating its applicability. *Pfizer Inc. v. Regor Therapeutics Inc.*, No. 3:22-CV-00190 (JAM), 2023 WL 1766419, at *3 (D. Conn. Feb. 3, 2023). The work product doctrine applies to "documents and tangible things that are prepared in anticipation of litigation or for trial by or for another party or its representative." *Id.* (quoting Fed. R. Civ. P. 26(b)(3)). Defendants have failed to meet their burden to invoke work product protections because the privilege log does not, among other things, indicate the document was prepared in anticipation of litigation or trial.

6. Communications Merely Containing Legal Analysis Are Not Privileged.

Defendants failed to demonstrate the existence of an attorney-client privilege for Entry No. 12 because none of the individuals identified (or to be identified) are attorneys.[7] Thus, as described above, Entry No. 12 fails because Defendants did not identify the existence of an attorney and their client. Defendants also state that the "[r]edacted portion of [the] document contain[s] legal analysis regarding DOT regulations." Ex. C at 4. Even if the redacted information contains legal analysis, Defendants fail to provide any information demonstrating that the redacted information meets any of the elements of the attorney-client privilege. Defendants fail to identify the attorney, the client, the existence of a confidential communication, whether the communication was made for the purpose of obtaining legal advice, or any information regarding possible waiver. *Id.*; *In re County of Erie*, 473 F.3d 413, 419 (2d Cir. 2007). The withheld document is titled "Joe Biweekly Report 9.16-26.docx," which does not suggest any relation to protected legal advice. The "Joe" likely represents Joe Fallurin, who Defendants indicated is the actual custodian of the document. Therefore, Defendants failed to demonstrate the withheld records in Entry No. 12 are privileged.

IV. CONCLUSION

For the foregoing reasons, CLF asks the Court to enter an Order declaring that Defendants have failed to meet their burden to demonstrate the applicability of the attorney-client privilege and work product doctrine, and compelling Defendants to produce complete and unredacted copies of the documents identified on their privilege log.

[7] Defendants indicated they would supply an updated privilege log to reflect a "typo" in Log No. 12. The proper custodian for that entry is Joe Fallurin and the author is Oluwafemi Taiwo, Ex. D at 2. Defendants do not identify either person as an attorney in the existing privilege log.

Dated: March 27, 2023

Respectfully submitted,

CONSERVATION LAW FOUNDATION, Inc., by its attorneys

/s/ Kenneth J. Rumelt

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