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United States District Court,
E.D. Kentucky,
Lexington.
FIRST TECHNOLOGY CAPITAL, INC., Plaintiff/Counterclaim Defendant,
v.
JPMORGAN CHASE BANK, N.A., Defendant/Counterclaimant and Third–Party Plaintiff,
v.
James L. Bates, Third–Party Defendant.

No. 5:12–CV–289–KSF–REW.
Dec. 10, 2013.

J. Wesley Harned, Delcotto Law Group PLLC, Michael Joseph Gartland, J. Wesley Harned, Delcotto Law Group PLLC, Andrew M. Stephens, Lexington, KY, for Plaintiff/Counterclaim Defendant/Third–Party Defendant.

David B. Tachau, Dustin E. Meek, Katherine E. McKune, Tachau Meek PLC, Louisville, KY, for Defendant/Counterclaimant and Third–Party Plaintiff.

ORDER

ROBERT E. WIER, United States Magistrate Judge.

***1** The Court considers the FTC/Bates [FN1] motion for return of documents (DE # 48), which targets certain allegedly privileged or work-product protected documents that the moving parties claim to have inadvertently disclosed in discovery. The matter is fully and ably briefed. Under the applicable standards, the Court finds (1) the 45 documents would otherwise qualify as privileged or protected [FN2], but (2) FTC/Bates, by counsel, waived the privilege or protection in a disclosure circumstance not warranting the protections of FRE 502(b). Here, the privilege holder, by counsel, did not take reasonable steps to prevent disclosure of the otherwise undiscoverable materials. As such, upon expiration of a designated order objection period under stated mechanics, or upon appropriate resolution of objections made, Chase shall have access to and use of the 45 documents in unredacted form.

FN1. The Court refers to FTC and James Bates jointly as FTC, unless the context requires differentiation.

FN2. This Order may use the word "privileged" or "protected" as shorthand to encompass both attorney-client privilege and work-product protection. Where and if the distinction matters, the Court identifies the concepts separately.

The parties agree about most of the standards and analyses that pertain. Per Federal Rule of Evidence (FRE) 501, in this diversity case, Kentucky law, specifically Kentucky Rule of Evidence (KRE) 503, resolves the substance of any attorney-client privilege; federal law governs work-product protection under Federal Rule of Civil Procedure 26(b)(3). On the existence of privilege/protection and on non-waiver, the right holder bears the burden. *See United States v. Dakota*, 197 F.3d 821, 825 (6th Cir.1999); *United States v. Roxworthy*, 457 F.3d 590, 593 (6th Cir.2006); *The St. Luke Hosps., Inc. v. Kopowski*, 160 S.W.3d 771, 775–76 (Ky.2005). FRE 502 exclusively applies to a determination of whether a litigant's inadvertent disclosure of otherwise protected materials constitutes a waiver.

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The Court ordered tender of the unredacted 45 pages and has reviewed those pages carefully, taking into account the claim cited by FTC in the privilege index. As a threshold matter, the Court agrees with FTC that content of each document enjoys either an attorney-client or work-product designation. Many of the documents are wholly or partly duplicative, but the papers fall into two categories: communications around the time of the FTC–Chase direct interactions on the AA Claim (July 2012) and communications regarding discovery in the litigation. Though the Court does not necessarily agree that all of the redactions or withholdings fit both privileges, each of the 45 pages is subject to at least partial protection, initially, as attorney-client privileged, and many also qualify for work-product protection. These matters might require further assessment [FN3] if not for the balance of this decision, which finds any applicable protection waived by disclosure.

> FN3. There are some inaccurate dates or identification components in the log (*e.g.*, FTC–02664 is a 20 **13** transmittal e-mail, though the real substance is the underlying transmitted document from July 11, 2012). Those do not impact the analysis.

The chronology related to the disclosure is clear. FTC had inadequately responded to discovery Chase served in May of 2013. This culminated in Chase learning, at or around the Bates deposition, that FTC had not properly sought to canvass for all responsive electronic information, including e-mails, in its possession, custody, and control. Chase suspended completion of the August deposition and properly demanded prompt compliance by FTC with a duty that dated back to May or June of 2013. This led FTC to search additionally for discoverable information, yielding a supplemental production around September 13, 2013. FTC attorney Andrew Stephens collected the papers and made that production, which encompassed 1500 pages (the “Stephens Production”).

***2** The Court describes and analyzes the Stephens Production based on the record, an affidavit from Stephens (DE # 48–2, Stephens Aff.), and an affidavit from Chase lawyer Katherine McKune (DE# 53–1, McKune Aff.). Per the McKune Affidavit, Stephens sent the hard copy documents to Chase without page numbers. The production did not include a privilege log or explanatory transmission identifying that FTC had withheld or culled protected information.

Chase reviewed the production via McKune. She quite creditably perceived from the identifiers and content of the records that many carried hallmarks of privilege. She responsibly handled those materials, as the Court previously observed in the case. Chase timely notified FTC's counsel of the potentially inadvertent disclosure of protected materials. FTC acted promptly, if a bit high-handedly, in demanding return of information. FTC first, and perhaps reflexively, sought return of all the materials McKune herself identified (about 140 pages). FTC then reviewed and cut the list down to 82 identified pages, but ultimately limited the claim by motion to the 45 pages of redacted listings on the October privilege log. Those 45 pages are the ones the Court has considered.

*Rule 502 Analysis*

Rule 502(b) applies to define whether inadvertent disclosure of protected information acts as a waiver. The Rule has three sub-conditions to a finding of non-waiver: (1) the disclosure must have been inadvertent; (2) the holder must have taken “reasonable steps to prevent disclosure”; and (3) the holder must have promptly taken reasonable steps to rectify the error. FRE 502(b). The Advisory Committee Notes (“Notes”) make plain that the intent of the Rule is to bring predictability to a previously hard-litigated area. *See id.* at Explanatory Note, ¶ 2 (stating goal of “predictable, uniform set of standards”). The language implements the design.

Under the Rule's structure, a disclosure is inad-

vertent or it is intentional, the dichotomy in the language. For an intentional disclosure of privileged material, and thus a waiver, subsection (a) defines the **scope** of waiver. For an unintentional disclosure of privileged matter, whether a waiver exists depends on the (b)(2) and (b)(3) factors, essentially judgments about the disclosing holder's care in guarding the privilege. The Court follows the view, stated in *Coburn Group, LLC v. Whitecap Advisors LLC,* 640 F.Supp.2d 1032, 1038 (N.D.Ill.2009), that any mistaken, or unintentional, production of privileged material is "inadvertent."

Here, the only evidence (and reasonable conclusion) is that either FTC identified the pages at issue as privileged and then mistakenly produced them anyway, or FTC did not adequately screen the documents for and thus did not appreciate application of privilege as to those items. Nothing suggests that FTC wittingly included in a production papers it knew were privileged. The Court finds that the production, as to the 45 pages, was not an intentional act of disclosing protected information and thus was inadvertent. FTC meets the 502(b)(1) standard.

***3** The case comes down to 502(b)(2) [FN4], whether FTC inadvertently disclosed but yet took "reasonable steps to prevent disclosure." As with any standard measured by what is "reasonable," the Court must employ a case-specific and flexible assessment of the holder's conduct. The Rule broadly envelopes prior reasonableness factors recognized in the pre-Rule cases. *See* Advisory Committee Notes, Explanatory Note, Subdivision (b) (noting Rule not a codification of pre-Rule "multi-factor" test cited but is "flexible enough to accommodate ... listed factors" which are "non-determinative guidelines that vary from case to case"); *Spieker v. Quest Cherokee, LLC,* No. 07–1225–EFM, 2009 WL 2168892, at *3 n. 6 (D.Kan. July 21, 2009) ("The nature of 'the reasonable steps' necessary for Rule 502(b) are [*sic* ] best determined on a case-by-case basis.").

FN4. The celerity and decisiveness of action by FTC, once prompted by Chase, would satisfy Rule 502(b)(3), as Chase essentially concedes.

The rule's use of the term "holder" does require at least a pause, given the well-established law that reposes the attorney-client privilege with client, not lawyer. *See Fausek v. White,* 965 F.2d 126, 132 (6th Cir.1992) ("The client, not the attorney, is the holder of the privilege[.]"); *United States v. Frazier,* 580 F.2d 229, 230 (6th Cir.1978) ("Basically the client is the holder of the privilege."). Based on its underpinnings, work-product protection may have more than one holder. *See, e.g., Bozzuto v. Cox, Castle & Nicholson, LLP,* 255 F.R.D. 673, 678 (C.D.Cal.2009) ("The holder of the work product immunity includes the attorney who prepared the work[.]" (citation omitted)). The parties have endeavored to clarify, and the Court has researched the matter. The Rule 502(b) cases, which typically involve assessing lawyer acts, uniformly seem, without discussion, to treat conduct regarding disclosure and preventive steps as within the attorney-client agency. This is a model supported traditionally in the cases as a function of implied authority. *See, e.g, In re Grand Jury Subpoena,* 9 F.3d 107, at *2 (6th Cir.1993) (table) (Guy, J., concurring) ("An attorney also may possess the implied authority to waive the privilege on behalf of his client." (citation omitted)); *Hydraflow, Inc. v. Enidine Inc.,* 145 F.R.D. 626, 636–37 (W.D.N.Y.1993) (pre-Rule 502 case, stating, "Recent decisions addressing the issue all impliedly conclude that, in the context of pre-trial discovery, an attorney's inadvertent disclosure of an otherwise privileged document may waive the privilege on behalf of the client." (citation omitted)). Here, FTC **expressly** delegated information management to Stephens. *See* DE # 48–2 (Stephens Aff.) ¶¶ 3–4 (describing discovery instructions from clients, including document production and "withholding from disclosure" privileged documents). Thus, FTC, as the privilege holder, tasked Stephens with tending to discovery obligations and privilege asser-

tions. This scenario easily supports imputation of Stephens's actions to FTC. FTC directly delegated to Stephens responsibility for minding FTC's privilege.

***4** The reasonableness of preventive steps surely includes both a design and an implementation component. Theoretical or intended measures may sound sufficient, but failure to implement such measures by reasonable execution could empty an ostensibly valid process of any real efficacy. A cross-country driver with a stated plan to obey all traffic laws, but who in actuality drives 100 mph at night with his lights off has not taken reasonable steps to prevent an accident.

Here, Stephens claims page-by-page review of the full 1500 page September production. *See id.* ¶ 7. He avers an effort to identify documents responsive to discovery, to cull protected documents, and to generate a final group for production. He claims actually to have segregated "a number of pages" during this process and to have placed the documents, as reviewed, into a "stack" depending on its category placement post-review. *See id*. ¶¶ 3–9. Despite those steps, FTC, by Stephens, produced to Chase all of the 1500 pages, including all of the pages as to which FTC now asserts privilege. Stephens can only speculate about what happened. Regarding the misincluded 45 pages, he asserts that his staff may have mistakenly sent a stack of the same 1500 pages that did not get reviewed or may simply have recombined the separated stacks. [FN5]

> FN5. Stephens also states that he may have missed the need to assert privilege for some of the papers. This would have been "only in small part." *Id.* ¶ 11.

The speed metaphor employed above is apt, in part, because of Stephens's stated review economy. He avers spending 4.1 hours on the entirety of privilege review. *Id.* ¶ 9. This means he reviewed and made decisions on the applicability of protection, and segregated pages, over the course of 246 minutes (or 14,760 seconds). Each document received, on average, only 9.84 seconds of review. Having looked at the 45 pages carefully, the Court is dubious that 9.84 seconds, about the time of an Olympic 100 meters race, is a reasonable investment within which to identify a document, consider author and recipients, appreciate subject matter, assess for discovery responsiveness, assess for KRE 503 and federal work-product application, gauge for any exception, and finally make the decision to withhold or produce. This is especially so where only parts of pages may be under protection, necessitating redaction.

The Court takes Stephens at his word, that he actually did turn each page. The rapidity of review indicates an unreasonably small temporal component to the process. The resulting undifferentiated production shows essentially no care in assuring that any segregation by Stephens affected the materials actually disclosed to Chase. In other words, the record does not show any steps to ensure that Stephens, or his staff, did not do exactly what they did, *i.e* ., produce the full 1500 pages. *See Peterson v. Bernardi*, 262 F.R.D. 424, 429 (D.N.J.2009) (criticizing party that did not "proffer any facts to establish that reasonable precautions were taken"). Stephens did not number the pages under scrutiny, which would allow a transferrable method of tracking not dependent on physical segregation. Stephens evidently did not generate any sort of list or index by which he could enumerate or record the documents withheld or the basis or reason for same. Although claiming to have made physical stacks, he does not state that he labelled those stacks or informed his staff that the mounds had meaning and significance relative to discovery. A privilege review process that results in the identification of protected records but the culling from actual production of **none** of those records is inherently suspect. *Thorncreek Apts. III, LLC v. Village of Park Forest*, Nos. 08–C–1225, 08–C–0869, 08–C–4303, 2011 WL 3489828, at *7 (N.D.Ill. Aug.9, 2011) ("[E]ach and every document the Village

sought to retain as privileged was inadvertently disclosed.... It is 'axiomatic that a screening procedure that fails to detect confidential documents that are actually listed as privileged is patently inadequate.' " (citation omitted)).

***5** Stephens's failure to produce a privilege log is a glaring signal of a production that did not include reasonable steps against disclosure of privileged material. FTC produced the full 1500 pages with no transmittal citing (or even suggesting) privileged documents and with no privilege log. Rule 26(b)(5)(A) **requires** a party to expressly make any privilege claim and produce a compliant log "**when** a party withholds information" as privileged or protected. FTC, by Stephens, simply produced the 1500 pages. Nor did FTC, upon learning, courtesy of Chase, that its production had problems, send Chase a record of Stephens's contemporaneous privilege analysis. Apparently it could not do that because no privilege index, listing, or recordation from Stephens existed. He now confidently cites the inadvertent production of the "forty-five (45) pages," but that number really is the end tally from a process overseen by Mr. Gartland. The record shows that Stephens's review did not generate any type of identifying list. Gartland used Chase's taxonomy first, then cut the list down to 82, then finally to the 45 via a formal privilege list. Gartland's efforts to handle a hard situation were responsible, but Stephens, who oversaw the disclosure at hand, is unable to show that, by any reasonable method of accounting for privilege, he could have proven a single document that he first segregated and then inadvertently produced. The affidavit simply hypothesizes ("I cannot say with any certainty") where reasonable steps would supply objective and verifiable corroboration.[FN6] DE # 48–2 (Stephens Aff.) ¶ 11.

FN6. It does not make sense that Stephens's staff would have reinserted documents that ultimately are interspersed throughout a large production. Further, it does not make (much) sense to think Stephens would have created two copies of the full production, worked through one, and then mistakenly allowed his staff to mail the other unreviewed set.

Other recognized factors (discovery scope, temporal pressure) cut against FTC. First, FTC has not claimed any problem with or uniqueness to discovery scope. The problem seems to be FTC's delay in making a full response, a response inclusive of all relevant electronic communications. The early September efforts necessitated review of 1500 pages by Stephens, but that is hardly a volume that stands out in this type of litigation, namely a commercial dispute involving a multi-million dollar transaction. Further, any time pressure resulted from FTC's own earlier actions. A party placing itself in a time vise does not get the same leeway as a pressured but blameless litigant.

The Court agrees with FTC that fairness is not much of a stand-alone consideration. If FTC's steps were reasonable, the Court would find no waiver. Since its steps were unreasonable, the Court finds waiver. The facts drive the result and nothing unusual creates equities that tilt the analysis.

Simply put, FTC does not meet its burden of proving non-waiver under Rule 502(b). FTC, by counsel, did not take reasonable steps to prevent disclosure of the 45 pages herein assessed. A page-by-page review/assessment sounds effective and reasonable, but if the facts show, as here, hasty review and no functional measures that would keep protected papers sequestered, the standard goes unmet. [FN7] The inadvertent disclosure by FTC thus waived any privilege or protection as to those pages.

FN7. The Court also must note that there really are just three categories of e-mail string that appear in the 45 pages: analysis of a

> particular offer, editing of a planned letter to Chase, and document-gathering in discovery. The critical nature of some of those documents, documents which appear multiple times, should have repeatedly prompted FTC to avoid mistaken production.

***6** Accordingly, the Court **DENIES** the motion to compel return (DE # 48). The nature of the materials may lead FTC to appeal this decision, and the Court preserves the status quo, *see* DE # 44, until that process, if any, unfolds. FTC shall file any appeal, under Rule 72(a), by no later than December 20, 2013. If FTC does not appeal, the Court's order is effective on expiration of the appeal deadline. If FTC does appeal, the access status remains in effect pending a ruling on the appeal or further Court direction.

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