UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 1:19-cv-23591-BLOOM/LOUIS

HAVANA DOCKS CORPORATION,

Plaintiff,

v.

NORWEGIAN CRUISE LINE
HOLDINGS, LTD.,

Defendant.
_____/

ORDER ON DEFENDANT'S MOTION TO COMPEL

This cause is before the Court on Defendant Norwegian Cruise Line Holdings, Ltd.'s Motion to Compel the Production of Documents Withheld on the Basis of the Work-Product Doctrine That Pre-Date January 16, 2019 (ECF No. 127). Plaintiff Havana Docks Corporation filed a Response in Opposition to the Motion (ECF No. 140), to which Defendant filed a Reply (ECF No. 142). A hearing was conducted on the Motion on January 28, 2021.

In its Motion to Compel, Defendant seeks to compel production of documents Plaintiff has withheld on the basis of asserted work product protection. The contested documents, according to Plaintiff's privilege log, were created between May 7, 1971 and January 15, 2019. Defendant challenges Plaintiff's ability to assert work product protection over communications created during suspension of Title III of the Helms-Burton Act, 22 U.S.C. § 6021, *et seq.* (the "Act") and contends that litigation could not have been reasonably contemplated much before the suspension was lifted, in May of 2019. Accordingly, Defendant seeks an order overturning the assertion of protection, and compelling production of the documents.

I. BACKGROUND

a. Factual and Procedural Background

As discussed by the Court in orders stemming from the parties' prior discovery disputes, Plaintiff alleges that Defendant trafficked in Plaintiff's interest in and certified claim to confiscated waterfront property in Havana, Cuba, and seeks damages under the Helms-Burton Act, 22 U.S.C. § 6021 et seq. Plaintiff owns a certified claim to a dock in Havana that Defendant allegedly used for the disembarking of passengers from its cruise ships that made port in Havana from approximately March 2017 through June 2019. Defendant contends that it is not liable to Plaintiff for use of the dock, because the Act carves out from the definition of "traffics" any "transactions and uses of property incident to lawful travel to Cuba, to the extent that such transactions and uses of property are necessary to the conduct of such travel." 22 U.S.C. § 6023(13)(B)(iii). Defendant contends its travel to Havana was pursuant to general licenses, thus lawful, and its use of Plaintiff's dock was "necessary" "given that the Cuban Government mandated use of the Subject Property." ECF No. 98 at 2.

The United States Government suspended Title III of the Act, which established a private cause of action, since its enactment in 1996. The suspensions continued in six-month increments—the fullest extent permitted by law—until January 15, 2019, at which point the Government extended the suspension for 45 days.[1] On March 4, 2019, the Government announced an additional 30-day suspension but added that the suspension would not apply to those entities listed on the United States State Department's List of Restricted Entities and Sub-entities

[1] U.S. Dep't of State, Media Note, Secretary's Determination of 45-Day-Suspension Under Title III of LIBERTAD Act (Jan. 16, 2019), available at https://www.state.gov/secretarys-determination-of-45-day-suspension-under-title-iii-of-libertad-act/.

Associated with Cuba.[2] The Government extended the Title III suspension for another 14 days on April 3, 2019,[3] and on April 17, 2019, the Government announced that Title III would become fully effective on May 2, 2019.

The present discovery dispute arises following Plaintiff withholding documents predating January 16, 2019, which Plaintiff argues were prepared in anticipation of litigation and which Plaintiff has withheld on the basis of work product protection.

b. Defendant's Motion to Compel

Following a discovery hearing on January 4, 2021, at which the parties agreed that briefing was necessary regarding the privilege questions at issue here, Defendant filed a Motion to Compel the production of certain documents withheld on the basis of the work-product doctrine pre-dating January 16, 2019. ECF No. 127. Defendant lays January 16, 2019, as a marker, arguing that prior to this date Plaintiff could not have reasonably anticipated litigation, and points to sixty-five specific documents in Plaintiff's privilege log that it argues Plaintiff should produce. *Id.* at 1, n.1.

First, Defendant argues as a matter of law that Plaintiff could not have contemplated litigation prior to when the Act was passed in 1996 and that, even were this not the case, the Declaration offered as evidence by Plaintiff does not "address the creation of documents and communications" pre-dating 2017. *Id.* at 2 (citing ECF. No. 127-1 (Johnson Declaration)). Defendant therefore argues that the documents pre-dating 1996 should be produced. *Id.* at 2, n. 2.

Second, Defendant assails the class of Plaintiff's withheld documents dated April 23, 2017 through January 15, 2019, insisting that during this time "there was—at best—only a remote

[2] U.S. Dep't of State, Media Note, Secretary Enacts 30-Day Suspension of Title III (LIBERTAD Act) With an Exception (Mar. 4, 2019), available at https://www.state.gov/secretary-enacts-30-day-suspension-of-title-iii-libertad-act-with-an-exception/.

[3] U.S. Dep't of State, Media Note, Secretary Pompeo Extends For Two Weeks Title III Suspension with an Exception (LIBERTAD Act) (Apr. 3, 2019), available at https://www.state.gov/secretary-pompeo-extends-for-two-weeks-title-iii-suspension-with-an-exception-libertad-act/.

possibility of litigation under Title III." *Id.* at 3. On January 15, 2019, the United States government renewed suspension of Title III for only forty-five days, whereas the prior renewals were consistently for six months. *Id.* at 2. Defendant again references the Johnson Declaration Plaintiff advanced in support, noting the following: (1) on March 1, 2017, Plaintiff first consulted an attorney in connection with prospective trafficking claims it might pursue against cruise lines; (2) Johnson stated that in early 2018, Plaintiff was "only 'aware of early indications that U.S. Government officials or representatives may be considering no longer suspending the Title III cause of action.'" ECF No. 127-1.

II. DISCUSSION

a. Legal Standard

First established by the Supreme Court in *Hickman v. Taylor*, 329 U.S. 495 (1947), the work product doctrine protects from disclosure materials prepared in anticipation of litigation "by or for another party or its representative (including the other party's attorney, consultant, surety, indemnitor, insurer, or agent)." Fed. R. Civ. P. 26(b)(3)(A). Such materials are only discoverable if a "party shows that it has a substantial need for the materials to prepare its case and cannot, without undue hardship, obtain their substantial equivalent by other means." Fed. R. Civ. P. 26(b)(3)(ii). The work-product protection is "distinct from and broader than the attorney-client privilege, and it protects materials prepared by the attorney, whether or not disclosed to the client, as well as materials prepared by agents for the attorney." *Burrow v. Forjas Taurus S.A.*, 334 F. Supp. 3d 1222, 1227 (S.D. Fla. 2018) (citing *Fojtasek v. NCL (Bahamas) Ltd.*, 262 F.R.D. 650, 653 (S.D. Fla. 2009)).

The party seeking to withhold discovery bears the burden of establishing by a preponderance of the evidence that the documents should be afforded work-product protection.

Diamond Resorts U.S. Collection Dev., LLC v. US Consumer Attorneys, P.A., No. 9:18-CV-80311, 2021 WL 505122, at *7 (S.D. Fla. Feb. 11, 2021) (citing *MapleWood Partners, L.P. v. Indian Harbor Ins. Co.*, 295 F.R.D. 550, 584 (S.D. Fla. 2013)). This necessitates a showing that the drafting entity anticipated litigation at the time the documents were drafted; the key inquiry here is determining when and why the document in question was created. *Burrow*, 334 F. Supp. 3d at 1227.

This Court, consistent with the plain reading of Rule 26(b)(3)A), its own precedent, and the precedent of other courts in the Southern District of Florida, requires the proponent to prove that the primary motivating purpose behind the document's preparation was that it would aid in litigation. *See Diamond Resorts U.S. Collection Dev.*, 2021 WL 505122, at *7 (citing *United States v. Davis*, 636 F.2d 1028, 1040 (5th Cir. 1981)); *Johnson v. Carnival Corp.*, No. 19-CV-23167, 2020 WL 6544490, at *2 (S.D. Fla. Nov. 6, 2020) (affirming the Discovery Order of this Court, *Johnson v. Carnival*, 19-CV-23167, ECF No. 68 at 3, which applied the "principal purpose" test). The "primary motivating purpose" test carries the added benefit of ensuring that documents prepared in the ordinary course of business are only afforded work-product protection if they are "substantially infused" with a litigation purpose. *Burrow*, 334 F. Supp. 3d at 1227 (noting that even in instances where litigation may be forthcoming, the protection is unavailable for documents "that are prepared in the ordinary course of business or that would have been created in essentially similar form irrespective of the litigation" (quoting *United States v. Adlman*, 134 F.3d 1194, 1202 (2d Cir. 1998)); *see also* Wright & Miller § 2024, at 346 ("[E]ven though litigation is already in prospect, there is no work-product immunity for documents prepared in the regular course of business rather than for purposes of the litigation").

To meet its burden, the proponent of the work-product privilege must establish underlying facts proving the existence of the privilege; this may be accomplished by affidavit. *Diamond Resorts U.S. Collection Dev.*, 2021 WL 505122, at *7 (citing *Bridgewater v. Carnival Corp.*, 286 F.R.D. 636, 639 (S.D. Fla. 2011)). The court must then weigh the sufficiency of the evidence in light of all of the circumstances of the case. *Id.*; *see, e.g.*, *Fid. Nat'l Title Ins. Co. v. Wells Fargo Bank, N.A.*, No. 12-22437, 2013 WL 12138558, at *2 (S.D. Fla. July 19, 2013) (finding the affidavit plaintiff submitted in support of her work-product claim was "wholly conclusory and [had] few details to substantiate her claim" that the document was created in anticipation of litigation).

b. Analysis

In its Motion, Defendant points to the various tests that courts in this District apply to determine whether a document was prepared in anticipation of litigation, citing that, while some apply the "primary motivating purpose" test, others ask whether the document was prepared because of the "reasonable prospect" of litigation, and others still consider whether the primary motivating purpose of the document was to aid in "possible future litigation." ECF No. 127 at 4-5. Defendant primarily argues that, irrespective of whether the Court considers the "primary motivating purpose" of the document versus its proximity to future litigation, the sixty-five documents in question should be produced because Plaintiff could not have anticipated litigation prior to January 16, 2019, the date the United States announced that it would only renew the Act's suspension for forty-five days instead of six months. *Id.*

i. Documents Arising Prior to the Act's Enactment in 1996

Defendant argues that Plaintiff must produce five documents predating the enactment of the Act in 1996,[4] because before that point, Plaintiff had no cause of action for trafficking in the Subject Property at issue here. Defendant also claims any argument that the documents were created in anticipation of the Foreign Claims Settlement Commission ("FCSC") certification process would be invalid because such documents were (1) only used relating to negotiations with the Cuban and U.S. governments, and (2) the certification process was not "adversarial" such that privilege would apply. *Id.* at 5.

Defendant further contends that Plaintiff has not sustained its burden here because it offered no sworn evidence in support of a work-product assertion for documents predating March 2017. *Id.* at 5-6. Plaintiff responds that Defendant never previously raised objections to Plaintiff withholding this class of documents and thus it did not offer evidentiary support (ECF No. 140 at 5-6). Defendant replied that (1) it noticed this issue for dispute in requesting the January 4, 2021 discovery hearing, and, (2) this assertion contravenes the Court's Order following the January 4, 2021 hearing for the parties to provide all evidence in support of the disputed privilege claims. ECF No. 142 at 5-6 (citing ECF Nos. 119, 124). At the hearing, Plaintiff explained that while the notice stated the Parties disagree on Plaintiff's assertion of work product for documents relating to Titles III and IV of the Act, but because the Act was not passed until 1996, Plaintiff had no notice that log entries prior to 1996 would be at issue. Ultimately, Plaintiff asserted that it does not intend to substantiate the claim of that the five documents at issue here are protected by work product privilege.

[4] This refers to the following documents: REV0016273; REV0016293; REV0016271; REV0016218; REV0016270.

Plaintiff's argument that the challenge by Defendant was insufficient to put Plaintiff on notice of the need to evidence the basis for the privilege with respect to these documents is not well placed. Defendant's Motion identifies the contested documents with specificity, including even the document identification numbers, ECF No. 127 at 5; this fact alone was sufficient to put Plaintiff on notice that these documents were at issue in this dispute. Because Plaintiff must support its claim that these documents are protected by work-product privilege, *see Diamond Resorts U.S. Collection Dev.*, 2021 WL 505122, at *7 (citing *Bridgewater*, 286 F.R.D. at 639), and because it has failed to offer an substantiating evidence, Plaintiff has failed to carry its burden with respect to the five documents that pre-date 1996.

Yet production of the documents will not be ordered, as Plaintiff has additionally asserted the attorney-client privilege with respect to these five documents; an assertion that Defendant has not challenged. Defense counsel argued that it has not *yet* raised a challenge to the privilege, waiting first to see the outcome of the present challenge. The Court will not entertain a piecemeal attack on the privilege log as Defendant suggests. Moreover, the time to raise any dispute over Plaintiff's assertion of the privilege with respect to these documents has lapsed, as the log was served in November of 2020. Accordingly, Defendant's Motion is **DENIED** with respect to this category of documents.

ii. Documents Arising Between April 2017 and January 15, 2019

Defendant next argues that Plaintiff should be ordered to produce the remaining documents at issue, dated between April 2017 and January 15, 2019, because Plaintiff did not *reasonably* anticipate litigation until January 16, 2019, when the U.S. Government renewed the suspension of the Act for forty-five days, as opposed to the customary six months.[5] In support, Defendant points

[5] The documents at issue here are as follows: REV0024491, REV0026262, REV0018994, REV0024461, REV0024258, REV0021200, REV0023892, REV0025397, REV0025388, REV0025390, REV0025315,

to the fact that, from the time the Act was passed in 1996, Title III was suspended in six-month increments—the fullest extent permitted by the Act—until January 15, 2019, when the United States Government renewed the suspension for 45 days instead. *Id.* at 7. Although Defendant notes that Plaintiff still had no right to bring a claim under Title III until May 2, 2019, when Title III became fully effective, the January 2019 extension marked when the U.S. Government "began to take actions in furtherance of the complete lifting of Title III's suspension," at which point, argues Defendant, litigation became more than a remote possibility. *Id.* at 8.

As clarified during oral argument, Defendant's argument here ultimately proceeds along two tracks: (1) as a matter of law, Plaintiff could not have—in fact no party could have, says Defendant—anticipated litigation prior to January 16, 2019; and (2) as a matter of fact, Plaintiff has not showed that it anticipated litigation prior to that date. With regard to the first point, Defendant argues that *In re Trasylol Prod. Liab. Litig.*, No. 08-1928-MDL, 2009 WL 2575659, at *1 (S.D. Fla. Aug. 12, 2009), stands for the proposition that, while litigation need not be imminent, the party seeking work product protection must have "reasonable grounds for anticipating litigation," such as, for example, becoming the subject of a government agency's investigation. ECF No. 127 at 9. When making this statement, however, the court in *Trasylol* was remarking on the need to afford work-production protection to documents in contexts where there was *not* a "traditional civil suit" in existence yet, but where certain factors—such as a government investigation—suggested "more than a remote possibility of future litigation." *In re Trasylol Prod. Liab. Litig.*, 2009 WL 2575659, at *5. In fact, implicit in the court's finding here is that the

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REV0025313, REV0025311, REV0025312, REV0028231, REV0028218, HDC 013888, HDC 015223, HDC 015227, HDC 015231, HDC 015234, HDC 015426, REV0019791, REV0019792, REV0029860, REV0020059, REV0020064, REV0025603, REV0020131, REV0020176, REV0020177, HDC 015218, REV0018866, HDC 015213, REV0025180, REV0025168, REV0025160, REV0020319, REV0020320, REV0020321, REV0020322, REV0025140, REV0020332, REV0018867, REV0025087, REV0025075, REV0025068, REV0025069, REV0025070, REV0025071, REV0025073, REV0025060, REV0025064, REV0025065, REV0025066, REV0025058, REV0025059, REV0025042, REV0025027, REV0025028.

litigation in question may never materialize; for example, the government may never bring a suit following its investigation, but that does not undermine the fact that a suit would be possible.

Defendant points to January 16, 2019, because it is the moment the Government began to "take actions in furtherance of the complete lifting of Title III's suspension," ECF No. 127 at 9, but this argument does not sufficiently account for the fact that Title III included a concrete and specific cause of action. At the hearing, defense counsel advanced as a hypothetical example the undersigned preparing to sue to enforce the Magistrate Judge's pay increase act: because it does not exist, I could not reasonably be anticipating litigation under it. There, the cause of action, not yet in existence, would be speculative and remote. The suspension of the cause of action under Title III, by contrast, did not render it hypothetical; it existed, just in suspended form. As stated by Plaintiff, bringing litigation against Defendant was a question of when, not if. ECF No. 140 at 8. This Court previously noted the following related to Defendant's due process objections to Title III litigation in another suit:

> In particular, the Court has explained that, although the right to bring an action under Title III was suspended for over twenty years since the date of its enactment, neither the effective date of Title III nor the provision imposing liability for trafficking were suspended. Instead, Title III's suspension was solely limited to the timing of when claimants could file suit against traffickers in their confiscated property. President Clinton explained that his intent in allowing Title III to take effect, while also suspending the right to bring an action under Title III, was to incentivize foreign companies to immediately cease trafficking in confiscated property, or face liability under Title III once the suspension was lifted, and to promote the United States' foreign policy goals relating to Cuba. Throughout the suspension period, however, and upon the removal of the suspension, Title III's civil remedy that created liability for trafficking in confiscated property remained intact and in force.

Havana Docks Corp. v. Norwegian Cruise Line Holdings, Ltd., No. 19-CV-23591, 2020 WL 5217218, at *14 (S.D. Fla. Sept. 1, 2020). I find, therefore, that Defendant's argument here fails

to the extent Defendant asserts that Plaintiff could not, as a matter of law, have anticipated litigation prior to January 16, 2019.

It remains Plaintiff's burden to prove that as a matter of fact the primary motivating purpose behind the creation of the documents in question was to aid in litigation. *See Diamond Resorts U.S. Collection Dev.*, 2021 WL 505122, at *7 (citing *Davis*, 636 F.2d at 1040). In support, Plaintiff points to the privilege log, noting that each of the entries at issue here explicitly relates to planning and strategy for Title III litigation. ECF No. 140 at 8. Plaintiff also notes that it first consulted with attorney Rodney Margol in early March 2017 in anticipation of "instituting, prosecuting, and/or negotiating" claims against cruise lines for trafficking in the Subject Property. ECF No. 140 at 4 (citing ECF No. 127-1 (Johnson Declaration) at ¶ 3). And then in 2018, avers Plaintiff, it retained consultants to "among other things, in devising a legal strategy in anticipation of litigation under Title III of the Libertad Act." *Id.* (citing ECF No. 127-1 (Johnson Declaration) at ¶ 4). Broadly speaking, Plaintiff avers that from 2017 to 2019, attorneys and representatives prepared documents in anticipation of Title III, some of which include discussions about "theories of liability and damages in potentially litigation under Title III against cruise lines." *Id.* (citing ECF No. 127-1 at ¶ 6).

Defendant contends that Plaintiff's hiring of counsel on March 1, 2017, to advise it of possible causes of actions for trafficking, should not be dispositive, because at best, Plaintiff was seeking legal advice regarding potential rights and damages under Title III. (ECF No. 127 at 8). In support, Defendant relies upon *Sun Capital Partners, Inc. v. Twin City Fire Ins. Co.*, No. 12-81397-CIV, 2015 WL 9257019, at *1 (S.D. Fla. Dec. 18, 2015), in which the court found that work-product protection could not apply to certain documents of the plaintiff's which pre-dated the final denial letter from the defendant insurance company. In *Sun Capital Partners*, the plaintiff

sought protection for documents it claimed were prepared in anticipation of litigation but were created, in some cases, more than two years before the plaintiff brought suit against the defendant. *Id*. The court found that the date of the denial letter was a "common sense date," since prior to that point, the parties were working to resolve their coverage disagreement and sought "to effect a business resolution, not prepare for litigation." *Id.* at *2. Any legal advice provided prior to that date from the plaintiff's coverage counsel was thus regarding plaintiff's rights under the contract for the purpose of reimbursement negotiations and, importantly, noted the court, the plaintiff did not retain litigation counsel until approximately a month and a half after receiving the final denial letter. *Id.* Defendant similarly seeks to draw a line between the time Plaintiff spent researching its claim under Title III with the time Plaintiff spent pursuing its Title III claim.

Here, Plaintiff rightly notes that disputes over work-product protection in the insurance context present particular issues inherent to insurance disputes, because documents "prepared by or for insurers present particular difficulties as responding to claims and preparing for resulting litigation are significant parts of the ordinary business of insurers." ECF No. 140 at 9 (citing Wright and Miller, *Federal Practice and Procedure*, § 2024 (3d ed. 2008). Plaintiff adds that, unlike an insurer whose ordinary course of business requires a constant "eye toward litigation," Plaintiff's preparation for Title III litigation were "functionally separate from its typical business activities" of maintaining the certified claim. *Id.* at 10.

The court in *Sun Capital Partners, Inc*. demarcated the time into two separate periods: one focused on claim resolution, the second focused on litigation. The court effectively found that the primary purpose of documents created prior to the final denial were focused on resolution and were thus not adversarial. By contrast, Plaintiff has advanced evidence to support its contention that its goal in researching its claim was for the express purpose of preparing for Title III litigation.

It is nevertheless the case, however, that documents that would be prepared in the ordinary course of business, litigation notwithstanding, cannot have a primarily motivating purpose of aiding in litigation. *See Burrow*, 334 F. Supp. 3d at 1227. Here, where Plaintiff's chief business task is to preserve its certified claim, that line could conceivably be a murky one, as there could be documents relating to pursuing claim defense or resolution which would not necessarily relate to the pursuit of litigation under Title III specifically.

For example, Rodney Margol was hired by Plaintiff to assist with instituting, prosecuting, and/or negotiating *any claims that may be asserted*. ECF No. 140-1 ¶ 3. This assertion is insufficient, standing alone, to afford blanket work-product protection to any document arising from Margol's representation, since such documents could feasibly relate to, for example, claim negotiation and resolution generally rather than Title III litigation specifically. Similarly, documents arising from the 2018 retention of the three consultants that relate to certified claim protection generally or lobbying activities,[6] rather than Title III litigation specifically, would not be afforded work-product protection.

Accordingly the undersigned has examined each of the contested entries on Plaintiff's privilege log and notes here that the description for each of the documents Plaintiff seeks to withhold provides a specific explanation sufficient for me to find, in conjunction with the Declaration, that the document was created for the purpose of Title III litigation.[7] Taken together

[6] Defendant asserts that Plaintiff hired the three consultants as lobbyists and thus no documents arising from their work with Plaintiff should be afforded protection. Plaintiff avers in response that all responsive documents relating to lobbying activities have been produced and those withheld relate only to the pursuit of Title III litigation. As noted above, the inquiry here is the primary motivating purpose for which the document was created, not the primary purpose of the representation overall, but, even so, Plaintiff has asserted via affidavit that the purpose of the representation was for, among other things, Plaintiff to seek advice related to its Title III claim, suggesting that Title III litigation was in fact the primary purpose. *See* ECF No. 127-1 ¶ 4.

[7] Importantly, Defendant does not levy any challenge against the sufficiency of Plaintiff's privilege log or descriptions, nor does it argue that these documents are not what Plaintiff purports them to be. Plaintiff further averred at oral argument that it previously offered to revise its narratives in the privilege log to be more explicit and that Defendant indicated this was unnecessary.

with Plaintiff's further proffer of factual support that it anticipated litigation under Title III through its representation by various attorneys beginning in March 2017, I find that Plaintiff has carried its burden to show that the primary motivating purpose behind the creation of the documents in question here was to aid in the pursuit of Title III litigation, and these documents should be afforded work-product protection. Defendant's motion to compel with respect to these documents is therefore **DENIED**.

DONE and ORDERED in Chambers in Miami, Florida, on this this 26th day of February, 2021.

LAUREN F. LOUIS
UNITED STATES MAGISTRATE JUDGE

cc: All Counsel of Record