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Core Tech International Corp.

BEFORE THE PUBLIC AUDITOR
PROCUREMENT APPEALS
TERRITORY OF GUAM

IN THE APPEAL OF	)	Docket No. OPA PA-17-10
	)	
CORE TECH INTERNATIONAL CORP.,	)	**APPELLANT CORE TECH INTERNATIONAL CORP.'S OBJECTIONS TO DEPARTMENT OF PUBLIC WORKS' PRIVILEGE LOG; MOTION TO COMPEL PRODUCTION OF DOCUMENTS**
Appellant.	)	

Appellant Core Tech International Corp. ("CTI"), by and through undersigned counsel, files the following objections to Appellee Department of Public Works' ("DPW") Attorney/Client Log Communication Confidential ("Attorney/Client Log"), filed in this matter on December 20, 2017 and hereby moves to compel production of all documents listed on the Attorney/Client Log.

I. DPW FAILED TO MEET ITS BURDEN THAT THE MATERIAL IS PRIVILEGED, AS THE PRIVILEGE LOG IS WOEFULLY DEFICIENT.

A party who withholds information based on privilege or work product has the burden of demonstrating that the material is privileged or protected. *United States v. Christiansen*, 828 F.3d 763, 803 (9th Cir. 2015). It is well established that the attorney client privilege generally protects confidential communications made by a client to his lawyer for the purpose of obtaining

legal advice. *Swidler & Berlin v. United States*, 524 U.S. 399, 403 (1998). The work product doctrine protects materials prepared in anticipation of litigation that reveal the "mental impressions, conclusions, opinions, or legal theories of an attorney." *In re Cendant Corp. Sec. Litig.*, 343 F.3d 658, 663 (3d Cir. 2003). DPW failed to meet its burden of demonstrating that any of the material on the Attorney/Client Log is protected from disclosure by the attorney-client or work product privileges, or any other privilege.

A privilege log must "expressly make the claim" of privilege and "describe the nature" of the withheld information in a way that "will enable other parties to assess the claim." G.R.C.P. 26(b)(5). The test for determining whether a privilege log is adequate is whether each entry states sufficient facts that establish each element of the privilege. *Burns v. Imagine Films Entertainment, Inc.*, 164 F.R.D. 589, 594 (W.D.N.Y. 1996). This requires a specific description of why something is privileged and not merely conclusory invocations of the privilege or work product rule. *Id.; Am. Sav. Bank, FSB v. UBS Painewebber, Inc.*, No. M8-85, 2002 WL 31833223, at *1-2 (S.D.N.Y. Dec. 16, 2002). Courts require that a party provide, for each document withheld, the date of the document, the authors, the recipients, a description of the subject matter, and an explanation why the document is privileged or immune from discovery. *Torres v. Kuzniasz*, 936 F. Supp. 1201, 1208 (D.N.J. 1996); *Bowne of N.Y.C., Inc. v. AmBase Corp.*, 150 F.R.D. 465, 474-75 (S.D.N.Y. 1993).

Here, the privilege log states only a "Date of communication", "To:" and "Re:" with little to no description of the subject matter of the communication. The Attorney/Client Log fails to state any of the following:

- Who is the **sender** of any of the communications listed;
- What are the identities and roles of each sender and recipient (e.g., are any of the individuals listed DPW staff or employees?);

- What privilege is being asserted;
- The basis for any privilege (e.g., client seeking or receiving legal advice, mental impressions of attorneys, etc.)

For example, here are only three descriptions which are typical of all of the entries in the Attorney/Client Log:

Date of Communication:	**To:**	**Re:**
03-29-17	AAG Keeler and PTG's Lanning & to PTG's Yao	[Left Blank]
04-14-17	DAG Espaldon DAG Orcutt & to AAG Keeler	Email re project status & Sidewalk Cross-Slopes
09-15-17	AAG Keeler	Moretto, PTG, comments on draft to Ms. Pierce and Mr. Blaz

From the above examples, like all of the other entries, there is no way to determine whether the claimed privileged information is actually covered by a privilege. There is no mention of what privilege is being asserted. There is no detailed description that any communication is actually with an attorney either seeking or receiving legal advice or that the communication contains the mental impressions of legal counsel. In the 03-29-17 entry, there is not even a description of the subject matter of the communication. Mere conclusory assertions or vague representations of facts are insufficient to meet the burden of establishing the attorney-client privilege. *United States v. Constr. Prods. Research, Inc.*, 73 F.3d 464, 473074 (2d Cir. 1996) (if a party invoking privilege does not provide sufficient detail in a privilege log to demonstrate fulfillment of all of the requirements for application of the privilege, the claim will be rejected); *see also PYR Energy Corp. v. Samson Res. Co.*, No. 1:05-CV-530, 2007 WL 446025, at *1-2 (E.D. Tex. Feb. 7, 2007) (holding that party waived attorney-client privilege as to some documents where privilege log's descriptions were "so vague and oblique as to be meaningless").

DPW failed to meet its burden of demonstrating that any of the communications are privileged. CTI requests that the Hearing Officer find that DPW waived any attorney-client or attorney work product privilege by failing to provide a sufficiently detailed privilege log and that the documents described therein should be produced to CTI forthwith. *Employers Reinsurance Corp. v. Clarendon Nat'l Ins.* Co., 213 F.R.D. 422, 428 (D. Kan. 2003) ("The law is well-settled that, if a party fails to make the required showing, by not producing a privilege log or by providing an inadequate one, the court may deem the privilege waived."); *see also McNamee v. Clemens*, No. 1:09-cv-01647-SJ-CLP, 2013 WL 6572899, at *2 (E.D.N.Y. Sept. 18, 2013) (holding privilege was waived due to an insufficient privilege log which failed to sufficiently describe the bases for asserted privileges and protections); *Acosta v. Target Corp.*, 281 F.R.D. 314, 323-25 (N.D. Ill. 2012) (ordering the production of certain documents listed on privilege log where defendant had failed to provide supporting factual material showing the documents were created and maintained as confidential legal advice); *ConAgra, Inc. v. Arkwright Mut. Ins. Co.*, 32 F. Supp. 2d 1015, 1018 (N.D. Ill. 1999) (directing defendant to produce numerous documents initially produced in redacted form because defendant failed to include sufficient descriptions of the documents in its privilege log to establish the privilege).

II. THE ATTORNEY-CLIENT PRIVILEGE DOES NOT ATTACH TO COMMUNICATIONS BETWEEN MR. KEELER AND PARSONS TRANSPORTATION GROUP.

Many of the allegedly privileged communications in the Attorney/Client Log were sent to or copied to recipients employed by Parsons Transportation Group (PTG). PTG is not a client of Mr. Keeler or the Office of the Attorney General (OAG). Yet the vast majority of the allegedly privileged communications in the Attorney/Client Log were made to or with PTG employees only. There is no attorney-client privilege between PTG and the OAG or PTG and Mr. Keeler. The communications listing only the PTG employees and Mr. Keeler (e.g., 12-09-16, 07-27-17,

08-17-17 to 08-18-17, 08-18-17, 08-29-17, etc.) are therefore not privileged for lack of an attorney-client relationship.

Further, where DPW *and* PTG personnel are recipients of any communications, the voluntary disclosure of privileged information to third parties such as PTG will generally destroy the privilege. *In Re Pacific Pictures Corp.*, 679 F.3d 1121, 1126-27 (9th Cir. 2012). The presence of a third party serves to undermine the fourth prong requiring the communication be "made in confidence." *Cavallaro v. United States*, 284 F.3d 236, 246 (1st Cir. 2002). Under these circumstances, communications directed to or from the OAG and DPW, which were disclosed to PTG or any other third party, are not privileged. *See Westinghouse Elec. Corp. v. Republic of the Philippines*, 952 F.2d 1414 (3d Cir. 1991) (voluntary disclosure of attorney-client communication to third party waived privilege); *In re Initial Public Offering Securities Litigation*, 2008 WL 400933 (S.D.N.Y. Feb. 14, 2008) (waiver of privilege occurred when attorney's memorandum to client was produced to third party).

III. DPW WAIVED ANY PRIVILEGES BY VOLUNTARY PRODUCING NUMEROUS DOCUMENTS TO CTI CONTAINING MR. KEELER'S LEGAL ADVICE.

CTI sent two (2) Sunshine Act requests to DPW requesting, among other things, documents and information about the Route 1/Route 8 Project; the Final Demand to Complete Project and Notice of Termination/Default issued by DPW to CTI; and communications between Mr. Keeler and DPW concerning his alleged advice about issuance of the Notice of Termination/Default. A. Arriola Decl., Exh. A. In response, DPW produced hundreds of pages of emails and documents, including the emails attached collectively as Exhibit B to A. Arriola Decl. These are only a small portion of the emails produced by DPW but they are representative of the communications between Mr. Keeler, DPW, and PTG showing *detailed* legal advice and comments by Mr. Keeler about DPW's notice to the surety concerning termination of the CTI

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Contract; drafting of the Notice of Termination/Default; drafting of the Final Demand to Complete Project; and numerous other communications in which Mr. Keeler opines about communications to CTI and about the Project generally. In addition, these same emails were produced to CTI's counsel as part of the procurement record in November, 2017. A. Arriola Decl. All of these emails were produced without objection by DPW. DPW is now attempting to withhold several of the emails already produced, including those dated: 03-15-17; 03-29-17; 08-18-17; and 08-21-17. Yet DPW produced several other emails in Exhibit B which relate to the same subject matter and for which no privilege log was provided. Further, these emails are of the same type listed in the Attorney/Client Log which DPW is now refusing to disclose.

The emails in Exhibit B were produced three times: in response to the two Sunshine Act requests and as part of the procurement record, without objection and without a privilege log.[1] Disclosure of the emails was voluntary and intentional, communicated to CTI without objection, and therefore any privileges were waived. *Curto v. Med. World Communications, Inc.*, 783 F. Supp. 2d 373, 378 (E.D.N.Y. 2011) (plaintiff waived attorney-client privilege by serving otherwise privileged documents directly on defendant's counsel); *Reyes v. San Francisco Unified Sch. Dist.*, No. 11-cv-04628-YGR, 2012 WL 4343784 at *4 (N.D. Cal. Sept. 20, 2012) (failure to object to production of a privileged document constituted waiver of the privilege when the objection was not made in a timely fashion); *Large v. Our Lady of Mercy Med. Ctr.*, No. 94 Civ. 5986, 1998 WL 65995 at *4 (S.D.N.Y. Feb. 17, 1998) (producing privileged communications to opponent without noting objection to the production in a privilege log constituted waiver). DPW cannot belatedly attempt to cure the waiver of its privileges by filing a deficient and untimely privilege log, nor can it selectively waive the privileges for some documents and not others. *See*

[1] DPW filed an Attorney/Client Confidential Communication Log Sheet on November 3, 2017 presumably in conjunction with its procurement record, but that Log Sheet refers primarily to documents concerning the procurement protest at issue in OPA-PA-17-09.

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In re Grand Jury Proceedings, 219 F.3d 175, 182-83 (2d Cir. 2000) (party may not selectively disclose privileged communications in support of a claim and then rely on the privilege to shield the remaining communication from the opposing party).

IV. DPW'S RELIANCE ON ADVICE OF COUNSEL DEFENSE WAIVES ANY ATTORNEY-CLIENT OR WORK PRODUCT PRIVILEGE.

DPW asserts a reliance upon advice of counsel defense in response to CTI's claim of retaliation. Where a party has placed in issue the decisions, conclusions, and mental state of its attorney who will be called as a witness to prove such matters, any privileged information goes to the heart of the claim, and "fundamental fairness requires that it be disclosed for the litigation to proceed." *Mitchell v. Superior Court*, 37 Cal. 3d 591, 605 (1984); *see XYZ Corp. v. United States*, 348 F.3d 16, 24 (1st Cir. 2003) (when a party asserts an advice of counsel defense, he waives the attorney-client privilege as to the entire subject matter of that defense); *Metropolitan Life Ins. Co. v. Aetna Casualty & Surety Co.*, 249 Conn. 36, 53 (1999) (party who put the substance of legal advice squarely at issue waived the attorney-client privilege concerning the communications that led to the initiation and continued pursuit of the case).

In *United States ex rel. Lutz v. Berkeley Heartlab, Inc.*, 2017 BL 111755, No. 9:14-cv-230-RMG, 2017 WL 1282012 at *3 (D.S.C. April 5, 2017), the U.S. District Court of the District of South Carolina held that a defendant who asserts an advice of counsel defense waives attorney-client privilege to all communications that occurred during the alleged misconduct and extends "to advice received during the entire period the misconduct is alleged to have been ongoing," right up to trial. In addition, the court held that the waiver included privileged attorney work product prepared during that time period, even work product that was never communicated to the client. Similarly, in *Cox v. Adm'r U.S. Steel & Carnegie*, 17 F.3d 1386, 1414 (11th Cir. 1994), the court held that when a party affirmatively asserts a good faith belief that its conduct was

lawful, "it injects the issue of its knowledge of the law into the case and thereby waives the attorney-client privilege." The court in *Cox* explained that the attorney-client privilege was "'intended as a shield, not a sword.' [A party] waives the privilege if it injects into the case an issue that in fairness requires an examination of otherwise protected communications."

CONCLUSION

Appellee Department of Public Works waived any attorney-client or work product privileges by: (i) failing to provide a detailed privilege log justifying application of any privileges; (ii) disclosing privileged communications to third parties such as Parsons Transportation Group; (iii) voluntarily producing numerous privileged communications to Core Tech International Corp. in this litigation; and (iv) asserting a reliance upon advice of counsel defense. Accordingly, all documents listed in the Attorney/Client Log should be produced, as they are "relevant to the appeal" and are part of the procurement record. 2 GAR, Div. 4, § 12104(c)(3).

Dated this 26th day of December, 2017.

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