UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

CASE NO.: 1:19-cv-23591-BLOOM/LOUIS

HAVANA DOCKS CORPORATION,

Plaintiff,

vs.

NORWEGIAN CRUISE LINE HOLDINGS LTD.,

Defendant.
_____ /

HAVANA DOCKS' OPPOSITION TO NORWEGIAN CRUISE LINE HOLDINGS LTD.'S MOTION TO COMPEL (D.E. 127) THE PRODUCTION OF DOCUMENTS WITHHELD ON THE BASIS OF THE WORK-PRODUCT DOCTRINE THAT PRE-DATE JANUARY 16, 2019

INTRODUCTION

Havana Docks has established that the documents created in anticipation of litigation under Title III of the Helms-Burton Act, 22 U.S.C. § 6021 *et seq*. ("Title III") warrant protection under the work-product doctrine. The declaration of Jerry Johnson (D.E. 127-1) demonstrates that from early March 2017 through January 2019, Havana Docks, its attorneys and its representatives developed a legal strategy to pursue Title III claims against cruise lines, like Norwegian, that trafficked in its confiscated Cuban property in violation of the law. Once the suspension of the right to bring an action under Title III (which became effective on August 1, 1996) was lifted on May 2, 2019, Havana Docks promptly initiated this litigation, just as anticipated. To assert work-product protection, no further showing is required.

Norwegian's Motion does not seriously dispute that these documents shape the contours of Havana Docks' legal strategy in this litigation. Instead, Norwegian urges the Court to apply an exceedingly narrow interpretation of the phrase "anticipation of litigation." Norwegian's argument is contrary to the standard set by the former Fifth Circuit and the facts of this case. It should be rejected.

The work-product doctrine is designed to protect documents that, considering their nature and the factual situation in a particular case, can fairly be said to have been prepared or obtained because of the *prospect* of litigation. Norwegian began violating Title III in March 2017 and Havana Docks appropriately prepared to sue Norwegian under that law at that time. Notwithstanding Norwegian's attempt to characterize this litigation as speculative and remote prior to January 2019,

Norwegian has been on notice since 1996 that trafficking in confiscated property would subject it to litigation under Title III. Havana Docks began preparation for that day in March 2017, the month Norwegian began trafficking in the Subject Property. Accordingly, the work-product doctrine protects these documents from disclosure and Norwegian's motion to compel should be denied.

MEMORANDUM OF LAW

I. Legal Standards.

As codified by Federal Rule of Civil Procedure 26(b)(3), the work-product doctrine protects from disclosure documents and tangible things "that are prepared in anticipation of litigation or for trial 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); *Fojtasek v. NCL (Bahamas) Ltd.*, 262 F.R.D. 650, 653 (S.D. Fla. 2009).

Two types of work product are protected under Rule 26(b)(3): fact work product and opinion work product. The former consists of information gathered in anticipation of litigation, while the latter is comprised of materials that reflect an attorney's, a party's or party's representative's "mental impressions, conclusions, opinions, or legal theories." *Bridgewater v. Carnival Corp.*, 286 F.R.D. 636, 639 (S.D. Fla. 2011); Fed. R. Civ. P. 26(b)(3)(B) (work product doctrine protects from disclosure the mental impressions and legal theories of a party's attorney or representative's concerning litigation). Fact work product is subject to discovery only upon a party's showing that it has a substantial need for the discovery and that it cannot obtain the

substantial equivalent by other means. *Bridgewater*, 286 F.R.D. at 640. Opinion work product, however, "enjoys a nearly absolute immunity and can be discovered only in very rare and extraordinary circumstances." *Id.* (quoting *Cox. v. Administrator United States Steel & Carnegie*, 17 F.3d 1386, 1422 (11th Cir. 1994)); *see also* Fed. R. Civ. P. 26(b)(3)(B) (opinion work product should be protected against disclosure).

Norwegian's Motion seeks disclosure of opinion work product in the form of documents and communications containing the mental impressions and legal theories of Havana Docks' attorneys and representatives about legal strategy under Title III.

II. The Documents at Issue Are Work-Product.

The proponent of work-product protection carries the burden to establish (1) the creation of a document or tangible thing; (2) prepared in anticipation of litigation; and (3) by or for a party or its representative. *Bridgewater*, 286 F.R.D. at 639 (citing Fed. R. Civ. P. 26(b)(3). Here, Havana Docks has satisfied all three elements.

Havana Docks provided Norwegian with the declaration of Jerry Johnson in support of its work-product assertions. Mr. Johnson is the Vice President, Comptroller, Treasurer, Secretary and a Board Member of Havana Docks. (D.E. 127 at ¶ 2.) For many years, Mr. Johnson has assumed the duty of carrying out essentially all of the company's corporate functions, which he does from Lexington, Kentucky. He is the person most knowledge of Havana Docks' efforts to prepare for litigation under Title III. (*See* **Exhibit A**, Decl. of Jerry Johnson (Jan. 15, 2021).)

In his declaration, Mr. Johnson states that Havana Docks first consulted with Rodney Margol, its attorney in this case, in early March 2017 in anticipation of "instituting, prosecuting, and/or negotiating" claims that may be asserted against any cruise line for trafficking in the Subject Property. (D.E. 127-1 at ¶ 3.) For context, this was the same month Norwegian is alleged to have begun trafficking in the Subject Property. (D.E. 56 at ¶¶ 21, 22, 30.) By early 2018, Havana Docks "became aware of early indications that U.S. Government officials or representatives may be considering no longer suspending the Title III cause of action." (D.E. 127 at ¶ 4.) At that point, Havana Docks engaged three consultants[1] "to assist, among other things, in devising a legal strategy in anticipation of litigation under Title III of the Libertad Act." (*Id.*)

Mr. Johnson further states that from early 2017 through 2019, attorneys and representatives acting on behalf of Havana Docks prepared documents "in anticipation and preparation for future litigation under Title III." (D.E. No. 127-1 at ¶ 6.) "Among these activities were discussions among Havana Docks' principals, attorneys, consultants and experts about theories of liability and damages in potential litigation under Title III against cruise lines." (*Id.*) These are the mental

[1] Norwegian's motion contends that all Mr. Johnson's declaration proves is that Havana Docks engaged lobbyists, not attorneys, when it became aware that the U.S. Government was considering lifting the suspension of the right to bring an action under Title III. (*See* D.E. 127 at 6.) But that is not what Johnson's declaration says. To the contrary, Johnson makes clear that Havana Docks has not asserted work-product privilege over any documents or communications created in connection with lobbying activities. (*See* D.E. 127-1 at ¶ 5.)

impressions, opinions, and legal theories that Norwegian is requesting the Court to order produced.

Norwegian's only challenge to this evidence is that Havana Docks, as a matter of law, could not have anticipated litigation under Title III until January 16, 2019. This two-part argument challenges: (1) Havana Docks' assertion of work product over documents created in the 1970s for use in proceedings before the Foreign Claims Settlement Commission ("FCSC"); and (2) Havana Docks' assertion of work product over documents pertaining to Title III that were created between April 23, 2017 and January 16, 2019.

The Court should reject both of these challenges for the reasons that follow.

A. The Arguments Directed at Pre-1996 Documents Should Be Denied.

Norwegian seeks to compel production of five documents that pre-date Title III's 1996 enactment, which were created in connection with proceedings before the FCSC. (*See* D.E. No. 127 at 6-7.) Norwegian requests the Court to overrule Havana Docks' work product assertions over these records because proceedings before the FCSC are not adversarial and because Havana Docks has not presented sworn evidence to substantiate its work product assertion over these records. (*Id.*)

The Court should deny both arguments because Norwegian has never noticed any objection to, and has never addressed, Havana Docks' assertion of attorney-client privilege over these records.[2] (*See* **Exhibit B**, Havana Docks Amended Privilege Log.)

[2] Norwegian identifies these five log entries by the following bates numbers: REV0016273; REV0016293; REV0016271; REV0016218; REV0016270. (Mot. at 6 n.4.)

This is the reason why Havana Docks did not produce a declaration pertaining to these records. And even if the Court were to find that the work-product doctrine does not apply to these documents, Havana Docks' unchallenged assertion of attorney-client privilege renders Norwegian's attempt to compel their production moot.

B. Norwegian's Narrow Interpretation of the "Anticipation of Litigation" Prong Is Unsupported by the Factual Circumstances of this Case.

Havana Docks anticipated litigation against Norwegian under Title III in March 2017, the same month Norwegian first began violating that law by trafficking in the Subject Property. For the Court to countenance Norwegian's argument that this litigation was a remote, speculative possibility, it must accept the following premise: no documents created before January 16, 2019—even if they were created for the purpose of formulating a Title III litigation strategy—could have been generated in anticipation of litigation. (*See* D.E. 127 at 7-9.) The Court should deny this argument for three reasons.

First, in dealing with the anticipation of litigation requirement, courts eschew the type of bright-line approach Norwegian urges and instead embrace a more nuanced analysis that turns on the particular circumstances of individual cases.

As a general rule, when "determining whether a document was made in anticipation of litigation, the primary focus is the reason or purpose for creating the document." *Gables Condo. & Club Assn., Inc. v. Empire Indemnity Ins. Co.*, No. 18-23659-CIV, 2019 WL 1317824, at *5 (S.D. Fla. Mar. 22, 2019) (citations and emphasis omitted).

Indeed, the former Fifth Circuit explains the test as follows: "litigation need not necessarily be imminent, as some courts have suggested, as long as the primary motivating purpose behind the creation of the document was to aid in possible litigation." *United States v. Davis*, 636 F.2d 1029, 1040 (5th Cir. 1981) (emphasis added; citations omitted); *Bridgewater*, 286 F.R.D. at 641 (same).

While such future litigation must be "more than a remote possibility," *Holbourn v. NCL (Bahamas) Ltd.*, No. 14-21887-CIV, 2014 WL 12600498 at *1 (S.D. Fla. Oct. 30, 2014), the work-product doctrine applies where "it can be fairly said that the document was prepared or obtained because of the prospect of litigation." *B.M.I. Interior Yacht Refinishing, Inc. v. M/Y Claire*, No. 13-62676-CIV, 2015 WL 4316929, at *3 (S.D. Fla. July 15, 2015). Stated differently, if a document would have been created "regardless of whether litigation was in the offing, then there is generally no reason to accord the document work-product protection." *Bridgewater,* 286 F.R.D. at 641 n.5 (*quoting* E. Epstein*, The Attorney–Client Privilege and the Work Product Doctrine*, 5th ed., Vol. II, 2007 A.B.A. Sec. Litigation).

Here, irrespective of when the suspension of the right to bring an action under Title III was lifted, the documents at issue would not have been created but for Norwegian's violations of Title III and the prospect of litigation under that law. As evidenced by Havana Docks' privilege log, the 60 documents Norwegian seeks between April 23, 2017 and January 15, 2019 pertain to planning and strategy for litigation under Title III. That Norwegian did not believe it would be sued for violating that law until January 2019 does not mean that Havana Docks did not

anticipate and plan for future litigation based on those violations. Absent the prospect of litigation under Title III—which, as the case law makes clear, need not be imminent—these documents would not have been created. Accordingly, under any formulation of the "anticipation of litigation" test, the documents at issue reflect Havana Docks' reasonable expectation that it would be involved in Title III litigation.

Second, and contrary to Norwegian's characterization of this litigation as a remote and speculative possibility, Title III's enactment placed it on notice that it would eventually face litigation if it trafficked in property confiscated by the Cuban Government. *Havana Docks Corp. v. Norwegian Cruise Line Holdings, Ltd.*, --- F. Supp. 3d ---- , 2020 WL 5217218, at **14-15 (S.D. Fla. 2020) (Bloom, J.) ("NCL was on notice of Title III's existence from the time it became law in 1996, and it had an obligation to familiarize itself with the mandates of Title III, especially once it began operating in Cuba."). Indeed, Norwegian admits that it has known about Havana Docks and its certified claim since at least February 2017. (**Exhibit C,** Norwegian's Answers and Objection to Havana Docks' First Request for Interrogatories at Interrogatory #1.)

Because Norwegian chose to traffic in the Subject Property in violation of Title III, the question has never been *whether* Havana Docks would bring litigation against Norwegian, but rather *when*. *See Norwegian Cruise Line*, 2020 WL 5217218 at **14-15 ("Title III's suspension was solely limited to the *timing* of when claimants could file suit against traffickers in their confiscated property."). Given that Norwegian began trafficking in the property sometime in March 2017, it can hardly be said that

Havana Docks' contemporaneous efforts to prepare for litigation were so remote as deprive it of work-product protection. The simple fact remains that a little over two years after Havana Docks' began preparing for litigation, this suit was filed. To say that Havana Docks could not reasonably anticipate litigation is to ignore the logical implications of Title III's enactment and Norwegian's own actions.

Third, the cases Norwegian relies upon to support its contention that Havana Docks could not have anticipated litigation at the time the documents were created are inapposite. *Sun Capital Partners, Inc. v. Twin City Fires Ins. Co.*, No. 12-81397-Civ, 2015 WL 9257019 (S.D. Fla. Dec. 18, 2015), *RTG Furniture Corp. v. Indus. Risk Insurers*, No. 07-80528-Civ, 2008 WL 11331986 (S.D. Fla. May 5, 2008) and *Guarantee Ins. Co. v. Heffernan Ins. Brokers, Inc.*, No. 13-23881-CIV, 2014 WL 5305581 (S.D. Fla. Oct. 15, 2014) all arose in the context of insurance disputes, a situation vastly different than the one confronting Havana Docks. *See* Wright and Miller, *Federal Practice and Procedure*, § 2024 (3d ed. 2008) (observing that in the work-product context, 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."). Indeed, several courts in this district have adopted a rebuttal presumption that documents prepared by or for an insurer prior to the denial of a claim are not work-product at all. *See, e.g.*, *1550 Brickell Assocs. v Q.B.E. Ins. Co.*, 253 F.R.D. 697, 698 (S.D. Fla. 2008).

But unlike an insurer, whose ordinary course of business requires a constant "eye toward litigation," *Milinazzo v. State Farm Ins. Co.*, 247 F.R.D. 691, 701 (S.D.

Fla. 2007), Havana Docks' preparations for Title III litigation were functionally separate from its typical business activities. With broad strokes, Norwegian attempts to blur this distinction. But, at bottom, there can be no confusing the difference between maintaining the certified claim and developing a litigation strategy in anticipation of suing on that claim. The documents Norwegian seeks unmistakably belong to the second category, and so warrant protection under the work-product doctrine.

CONCLUSION

For the foregoing reasons, Havana Docks respectfully requests that Norwegian's Motion be denied.

Dated: January 22, 2021.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was filed with the Clerk of the Court. I also certify that the foregoing document is being served this 22nd day of January, 2021, on all counsel of record or pro se parties either via transmission of Notices of Electronic Filing generated by CM/ECF or in some other authorized manner for those counsel or parties who are not authorized to receive electronically Notices of Electronic Filing.

By: s/ Roberto Martínez
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