UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

CASE NO.: 19-cv-23591-BLOOM/Louis

HAVANA DOCKS CORPORATION,

Plaintiff,

v.

NORWEGIAN CRUISE LINE HOLDINGS LTD.,

Defendant.
_____/

NORWEGIAN CRUISE LINE HOLDINGS LTD.'S RESPONSE IN OPPOSITION TO HAVANA DOCKS CORPORATION'S MOTION TO COMPEL EVIDENCE WITHHELD UNDER THE ATTORNEY-CLIENT PRIVILEGE AND WORK-PRODUCT DOCTRINES

Defendant Norwegian Cruise Line Holdings Ltd. ("Norwegian"), through undersigned counsel, provides the following Response in Opposition to the Motion to Compel Production of Evidence Withheld Under the Attorney-Client Privilege and Work-Product Doctrines (the "Motion," ECF No. 128) filed by plaintiff Havana Docks Corporation ("Plaintiff").

INTRODUCTION

In breathtakingly sweeping fashion, via the Motion Plaintiff seeks to do away with nearly all aspects of the attorney-client privilege and work-product protections in this case by arguing that although ***Plaintiff*** is the one who brought a claim under the Helms Burton Act, ***Norwegian*** has purportedly injected Norwegian's corporate "state of mind" into the case by denying that it violated the Act. But Norwegian has not asserted a single position or defense that relies on Norwegian's subjective understanding or interpretation of the law. It simply has denied, in a variety of ways, that it objectively violated the law. If, on this basis, the Court were to find that Norwegian impliedly waived privilege, the result would be catastrophic: ***any*** defendant sued under ***any*** statute with an element of scienter would lose its right to assert privilege ***by merely denying liability***.

Plaintiff also mischaracterizes Norwegian's corporate representatives' deposition testimony as a selective disclosure of privileged information when in fact the answers Plaintiff identifies are in response to questions about legal conclusions posed to non-attorney witnesses. Importantly, and as Plaintiff concedes, Norwegian has already produced information pertaining to its carrier services to Havana, including any compliance efforts. What Plaintiff seeks now is disclosure of the privileged, legal rationale behind why Norwegian operated in the way it did. But Norwegian has not injected any issue that would waive such privilege. Lastly, Plaintiff mischaracterizes the role of Norwegian's in-house counsel. Plaintiff recognizes that such counsel was involved in various ***business*** aspects of Norwegian's cruises to Havana, but argues that that necessarily means that such counsel's privileged ***legal*** advice has been placed at issue. Not so. Thus, the Court should find that Norwegian has not injected into this case the issue of its knowledge or intent because Norwegian simply has not affirmatively alleged any claim or defense that requires a showing of the same. But even if Plaintiff had met its heavy burden to establish waiver (which it has not), Plaintiff cannot show that still "allow[ing] the privilege to protect against disclosure of such information ***would be manifestly***

unfair" to it because Norwegian's subjective beliefs or knowledge of the law are not an element of any of Norwegian's defenses. *Cox v. Adm'r U.S. Steel & Carnegie*, 17 F.3d 1386, 1417 (11th Cir. 1994), *opinion modified on reh'g*, 30 F.3d 1347 (11th Cir. 1994) (emphasis in original).

Plaintiff, however, does not stop there. Ignoring the fact that Norwegian's engagement agreement with its legal counsel in Cuba, Consultores Maritimos S.A. ("COMAR"), and sworn evidence demonstrate that a confidential relationship existed, Plaintiff conclusorily argues that Norwegian nonetheless did not have a reasonable expectation of confidentiality with its counsel. The only basis for this argument is that, according to Plaintiff, COMAR has a connection to the Cuban Government and may have represented other parties involved in the negotiation of the agreements to cruise. But Plaintiff cannot show that each of these parties shared common lawyers – because they did not. Plaintiff additionally challenges the common-legal interest relationship that Norwegian has with the Cruise Line International Association ("CLIA") and CLIA's members by falsely characterizing CLIA as a mere lobbying institution and asserting that Norwegian is not a member to the written common-interest agreement. This too is incorrect.

For these reasons, the Court should deny Plaintiff's Motion, including its request for the appointment of a special master.

LEGAL STANDARD

The attorney-client privilege is the ***oldest*** of privileges known to the common law and is designed "to encourage full and frank communication . . . and thereby promote broader public interests in the observance of law and administration of justice." *Cox*, 17 F.3d at 1414 (citation omitted). "It is undisputed that the attorney-client privilege protects disclosures made by a client to his attorney, in confidence, for the purpose of securing legal advice or assistance." *Knox v. Roper Pump Co.*, 957 F.3d 1237, 1248 (11th Cir. 2020). "The Supreme Court has broadly construed this privilege in support of the underlying policy 'that sound legal advice or advocacy serves public ends and that such advice or advocacy depends upon the lawyer's being fully informed by the client.'" *Miccosukee Tribe of Indians of Florida v. United States*, 516 F.3d 1235, 1262–63 (11th Cir. 2008) (citation omitted). The work-product doctrine, on the other hand, "is codified in Federal Rule of Civil Procedure 26(b)(3) and offers protection for materials that are: '(1) a document or a tangible thing,

(2) prepared in anticipation of litigation, and (3) by or for a party, or for his representatives.'" *Siegmund v. Xuelian Bian*, No. 16-CV-62506, 2018 WL 3725775, at *9 (S.D. Fla. Aug. 1, 2018) (Louis, Mag. J.) (citation omitted). In a federal question case, privilege determinations are made under the federal common law. *See id.* (citing Fed. R. Evid. 501).

ARGUMENT

I. Norwegian Has Not Waived Privilege Over Documents and Communications Reflecting Its Knowledge of, and Intent to Comply with, the LIBERTAD Act or the OFAC Regulations

The attorney-client privilege belongs to the client and, as such, it is only the client who may waive it either expressly or by implication under limited circumstances.[1] *See id.* at 1248. As this Court recently held, under the implied waiver doctrine, "[a]ttorney-client privilege is waived 'when a litigant places information protected by it in issue through some affirmative act for his own benefit, and to allow the privilege to protect against disclosure of such information *would be manifestly unfair* to the opposing party.'" *Siegmund*, 2018 WL 3725775, at *11 (Louis, Mag. J.) (emphasis in original) (citation omitted). Courts have refused to find waiver "where the party attacking the privilege alleged no prejudice, *see Cox*, 17 F.3d 1386, ***and where the party asserting the privilege did not put his communications with counsel at issue by making the communications a factual basis of a claim or defense***." *Id.* at *11 (emphasis added) (citation omitted).

The attorney-client privilege is not "set aside simply because the opposing party claims that the information held by the attorney is necessary to prove the opposing party's case." *Centennial Bank v. ServisFirst Bank, Inc.*, No. 8:16-CV-88-T-36CPT, 2020 WL 1061450, at *3 (M.D. Fla. Mar. 4, 2020).[2] Rather, the Eleventh Circuit has found that a client may indirectly waive the attorney-client privilege in only three limited ways: "(1) when a client testifies concerning portions of the attorney-client communication, (2) when a client places the attorney-client relationship directly at issue, and (3) when a client asserts reliance on an attorney's advice as an element of a claim or

[1] Plaintiff does not argue in its Motion that Norwegian has expressly waived privilege.

[2] Although *Centennial Bank* case was a diversity action where the court applied the implied waiver doctrine to the attorney-client privilege under Florida law, the court also analyzed the Eleventh Circuit's holding in *Cox*. *See* 2020 WL 1061450, at *5.

defense." *Cox*, 17 F.3d at 1418.

In the principal Eleventh Circuit case on the issue of implied waiver, *Cox*, plaintiffs alleged that defendant USX violated a criminal statute of which "willful" violation of the law was an element. *Id.* USX defended the claim by "consistently tak[ing] the position that '[a]t the time the . . . policy [at issue] was implemented . . . USX believed the policy to be lawful.'" *Id.* The Court reasoned that "it would be inequitable to allow USX to present evidence tending to show that it intended to comply with the law, while allowing it to cloak in privilege those documents tending to show it might have known its actions did not conform to the law." *Id.* Given these circumstances, the Court found that "USX could have denied criminal intent without affirmatively asserting that it believed that its change in pension fund policy was legal. Having gone beyond mere denial, affirmatively to assert good faith, USX injected the issue of its knowledge of the law into the case and thereby waived the attorney-client privilege." *Id.* at 1419.

In a recent application of *Cox*, the Eleventh Circuit expressly held that whether a defendant has asserted an advice of counsel defense is a key part of assessing whether a client has impliedly waived the privilege. *See Knox*, 957 F.3d at 1249. In *Knox*, the plaintiff reported to his employer that he felt that, due to his race, he was being treated more harshly following an altercation with a co-worker. *Id.* at 1241. The company then demanded that the plaintiff sign a release of claims, and when the plaintiff did not do so, he was fired. *See id.* at 1241-44. The company's president claimed that it was his decision to insist on the allegedly retaliatory release of claims and that he had always intended for plaintiff to sign an agreement following the altercation that included the release. *See id.* at 1249. Arguing this constituted implied waiver, Plaintiff sought disclosure of the company's communications with counsel to probe whether the president was really the decision maker as opposed to the company's counsel. *See id.* The Court rejected plaintiff's waiver argument, reasoning that the president's testimony that he was the one who decided to include the release did not constitute a waiver of privilege with respect to communications with counsel because "[m]ost importantly, the defendants did not assert an advice-of-counsel defense," "[t]he fact that the communications might be helpful to Knox's claim does not in itself waive the privilege," the president had not revealed the substance of privileged communications, and, thus, "[h]is testimony [did] not constitute an offensive,

selective waiver of privilege that entitle[d] [plaintiff] to discover the privileged material." *See id.*

Plaintiff relies on *Cox*, as well as a plethora of opinions from ***outside*** of this District and Circuit, for the proposition that (1) Norwegian's assertion that its use of the Subject Property was pursuant to the lawful travel exemption to trafficking under the Helms-Burton Act and (2) Norwegian's assertion of its Due Process affirmative defense put at issue Norwegian's knowledge of the law. Not so. *Cox* demonstrates that Norwegian has ***not*** waived privilege because Norwegian has not asserted any reliance on its attorneys' advice or placed its subjective intent at issue – that is, Norwegian does not intend to present evidence that it intended to comply with the law, even though Norwegian ***denies*** that it intended to ***violate*** the law. *See Cox*, 17 F.3d at 1419; *Siegmund*, 2018 WL 3725775, at *11 (citation omitted). In *Siegmund*, the plaintiff argued that the defendant had impliedly waived the attorney-client privilege by asserting in an affirmative defense that he had not violated a Florida statute that requires that a director discharge his duties in "good faith." *Id.* at 12. The Court disagreed, drawing a clear distinction between the affirmative assertion of a "belief" in compliance with the law, as made in *Cox*, and the assertion of actual compliance with the law, holding:

> In *Cox*, however, the Court held that a defendant waived the privilege when it raised an affirmative defense that it did not believe an agreement to compensate union negotiators was illegal. Specifically, the Court noted that the waiver occurred from the defendant's assertion that it believed its actions were legal and from the implications that flowed from the decisions that stemmed from its understanding of the legality of his actions. Here, while Bian and Guan have asserted compliance with the Florida statutes, they have not asserted any reliance on their attorneys' advice or placed their good faith at issue. Indeed, at the hearing, Bian and Guan's counsel represented that her clients had not, and would not, assert any defenses based on the reliance of advice from counsel. Moreover, the fact that § 607.0830 requires that a director discharge his duties "in good faith" along with several other requirements, does not automatically translate into an affirmative assertion of good faith reliance on counsel's advice.

Id. Just as the plaintiff unsuccessfully argued in *Siegmund*, Plaintiff now argues that Norwegian's denial of Plaintiff's claim and affirmative allegation that Norwegian actually complied with the law (*i.e.*, the lawful travel defense) automatically puts at issue Norwegian's privileged attorney-client communications. However, the mere assertion that a party has complied with the law does not invoke that party's "belief" as to lawfulness, and does not put at issue attorney-client communications. *Id.*

Thus, as it did in *Siegmund*, the Court should reject Plaintiff's argument.[3]

In short, Plaintiff's strained interpretation of Norwegian's pleading does not demonstrate that it would be "manifestly unfair" for Plaintiff to be deprived of Norwegian's privileged documents and communications. Plaintiff's Motion should accordingly be denied.

A. Norwegian's Subjective Intent Is Not an Element of Norwegian's Lawful Travel Defense

Norwegian has not affirmatively injected into this case the issue of its subjective belief or understanding of the United States laws and regulations governing compliance, or otherwise its intent to comply with the same, by asserting its lawful travel defense.

Plaintiff incorrectly stretches Norwegian's briefing in support of Norwegian's Motion to Dismiss Plaintiff's initial Complaint as support for the position that it is Norwegian who has injected Norwegian's subjective beliefs into the case. That briefing merely challenged ***the sufficiency of Plaintiff's own allegations*** by arguing that "Plaintiff failed to plead sufficient facts to create a plausible claim under the statute because there are no allegations regarding Norwegian's required state of mind, that is: that Norwegian '*knowingly and intentionally*' engaged in prohibited trafficking (*i.e.*, travelled unlawfully)." Norwegian's Mot. to Dismiss at 5, ECF No. 31; *see also* Norwegian's Reply in Supp. of Mot. to Dismiss at 2, ECF No. 41 ("This is an issue of the sufficiency of Plaintiff's pleading."). Norwegian's argument that "[t]he [o]nly [a]llegations and [e]vidence [d]emonstrate that Norwegian's [i]ntent [w]as at [a]ll [t]imes [l]awful [p]ursuant to the Act's [s]afe [h]arbor" was based only on what the Court could consider in adjudicating a motion to dismiss – that is, the judicially noticeable regulations and public government statements that were in place or made during the alleged trafficking. *See* Norwegian's Mot. to Dismiss at 10. Plaintiff would have the Court take the last sentence of this section in Norwegian's Motion to Dismiss completely out of context and ignore the entire section that precedes it. All Norwegian was doing when it took the position that "Norwegian can be said to have only '***knowingly and intentionally***' engaged in the acts enumerated in the trafficking exceptions" was summarizing that Plaintiff's factual allegations in the Complaint and

[3] Similar reasoning applies to Plaintiff's argument that Norwegian has waived privilege by asserting a Due Process affirmative defense. Norwegian's Due Process argument is founded on an objective interpretation Title III and its continued suspension, not Norwegian's subjective beliefs about the same.

judicially noticeable facts did not state a claim as to the elements of a cause of action under the Act. *Id*. This statement did not magically create a new burden on subjective intent (*i.e.*, that it lacked knowledge that it was allegedly violating the Act) for Norwegian to prove.

Following that briefing, Judge Bloom dismissed this case with prejudice on the basis that Plaintiff's former concession expired prior to Norwegian's alleged use, and declined to consider Norwegian's other arguments, including the argument challenging the sufficiency of Plaintiff's intent allegations. *See* Order on Mot. to Dismiss at 10, ECF No. 42. Subsequently, Judge Bloom granted Plaintiff's Motion for Reconsideration, vacated the Court's prior Order on Motion to Dismiss, and granted Plaintiff leave to file its Amended Complaint, which the Court found sufficiently alleged that "NCL knowingly trafficked in the confiscated Subject Property." Order at 28, ECF No. 53. Understanding that Judge Bloom disagreed with Norwegian's initial argument challenging the sufficiency of Plaintiff's allegations with respect to the intent element, Norwegian did not re-raise that argument in its subsequent Motion to Dismiss Plaintiff's Amended Complaint.[4] *See generally* Norwegian's Mot. to Dismiss Am. Compl., ECF No. 66. Thus, as the case stands, the only issue of intent in this case is the one that ***Plaintiff*** has put at issue as part of its affirmative case, which requires a showing that Norwegian knowingly and intentionally engaged in one of the enumerated acts with respect to confiscated property. This certainly does ***not*** provide Plaintiff with a basis for seeking Norwegian's privileged documents. *See U.S. Commodity Futures Trading Comm'n v. S. Tr. Metals, Inc.*, No. 14-22739, 2015 WL 11233138, at *1 (S.D. Fla. Oct. 5, 2015) (quoting *Cox*, 17 F.3d at 1418) (noting that a court "cannot justify finding a waiver of privileged information merely to provide the opposing party information helpful to its cross-examination or because information is relevant").

Here, Norwegian's lawful travel defense does not require that it show its subjective belief of

[4] Norwegian's Eleventh Affirmative Defense is nothing more than a denial of the elements that Plaintiff must prove as part of its affirmative case. *Compare* Norwegian's Answer and Affirmative Defenses to Am. Compl. at 16, ECF No. 107 *with* 22 U.S.C. § 6023(13) ("[A] person 'traffics' in confiscated property if that person knowingly and intentionally [does one of the enumerated acts]."); *see also Maar v. Beall's, Inc.*, 237 F. Supp. 3d 1336, 1339–40 (S.D. Fla. 2017) (finding that defendant's affirmative defense was a "mere negation of the willfulness charge at issue" where defendant's affirmative defense merely stated "Plaintiffs' Complaint fails to state a cause of action upon which relief may be granted because Plaintiffs fail to plead sufficient facts to show that any alleged failure to pay overtime compensation or other wages was 'willful,'" Def.'s Answer and Defenses at 8, *Maar v. Beall's, Inc.*, 237 F. Supp. 3d 1336 (S.D. Fla. 2017), ECF No. 8).

legality. ***Even Plaintiff concedes as much***. *See* Pl.'s Mot. to Compel Discovery Concerning Other Cuban Ports at 2-3, ECF No. 94 ("To establish this affirmative defense, Norwegian must prove all three elements: (1) that its travel to Cuba was "lawful" under the LIBERTAD Act (the 'Lawful Element'); (3) that its 'transactions and uses' of the Subject Property were 'incident' to that travel (the 'Incident Element'); and (3) that its "transactions and uses" of the Subject Property were 'necessary to the conduct" of that travel (the 'Necessary Element')."). Moreover, Norwegian does not allege in its First, Second, or Eleventh Affirmative Defenses that it believed in the legality of its actions. As such, those mere denials do not amount to a waiver. *See Centennial Bank*, 2020 WL 1061450, at *5 ("Even were *Cox* and *Bilzerian* to apply here, they do not sweep as widely as Centennial claims. Those decisions stand for the proposition that a party impliedly waives the attorney-client privilege where it affirmatively asserts as a defense that it had a good faith belief in the legality of its actions."). Were the Court to find otherwise, any defendant sued under a statute with an element of scienter would lose its right to assert privilege simply by denying liability.

Plaintiff also points to deposition testimony in which Norwegian's deponents have made statements to the effect that "[w]e believed then, as we believe now, that we were operating at all times legally in every way" (Motion Ex. O, Del Rio Dep. 54:21-25) and that Norwegian "never thought [it] w[as] doing anything illegal" (Motion Ex. D, Parodi Dep. 64:11-12),[5] but (1) these were answers to questions that ***Plaintiff*** asked, rather than anything that ***Norwegian*** injected into the case, and (2) what Norwegian believed or thought is simply not an element of Norwegian's lawful travel defense. *See Siegmund*, 2018 WL 3725775, at *11 (noting that courts have refused to find an implicit waiver of privilege where the party asserting the privilege did not make the privileged communications a factual basis of a claim or defense).[6] Unlike the defendant in *Barker ex rel. U.S.*

[5] Plaintiff also points to another of its questions to Mr. Parodi, one of Norwegian's corporate representatives, concerning "what facts support Norwegian Cruise Line's contention that its cruises to Cuba were lawful travel under U.S. law." *See* Motion Ex. D, Parodi Dep. 162:3-164:11. This was an inappropriate question that asked Mr. Parodi, who is not a lawyer, to draw a legal conclusion.

[6] The suggestion that the size of Norwegian's privilege log reflects that Norwegian "had significant concerns about its compliance with [the LIBERTAD Act and OFAC regulations]" is incorrect, specious, and – in any event – irrelevant because Norwegian's lawful travel defense does not have an intent element. The length of the log, if anything, reflects the extreme breadth of Plaintiff's discovery requests to-date.

v. Columbus Reg'l Healthcare Sys., Inc., No. 4:12-CV-108, 2014 WL 4287744, at *4 (M.D. Ga. Aug. 29, 2014), Norwegian does not intend to – because it does not have to – show that it knowingly and intentionally complied with the applicable United States laws and regulations.[7] *See U.S. ex rel. Locey v. Drew Med., Inc.*, No. 606-CV-564-ORL-35KRS, 2009 WL 88481, at *3 (M.D. Fla. Jan. 12, 2009) (finding "*Cox* and the 'at issue waiver' is inapposite" where defendants did not show that plaintiffs intended to rely on privileged information to supports their claims).

B. Norwegian's Due Process Defense Does Not Put at Issue Norwegian's Subjective Beliefs

One of Norwegian's affirmative defenses is that applying Title III to Norwegian's activities in Cuba violates the Due Process Clause of the United States Constitution in that Norwegian lacked "fair notice" that its authorized travel to Cuba could eventually subject it to Title III liability. *See* Answer and Affirmative Defenses to Am. Compl. at 18; Mot. to Dismiss Am. Compl. at 16-19.

"Waiver requires a claim that 'will necessarily require that the privileged matter be offered in evidence.'" *U.S. Commodity Futures Trading Comm'n*, 2015 WL 11233138, at *3 (citation omitted). In *U.S. Commodity Futures*, the court found no waiver where "neither Plaintiff nor the Court need[ed] access to the privileged communications to infer . . . why [defendant] would have thought his signing [of an] agreement would preclude further prosecution." *Id.* at *4 (noting that "[f]rom the face of the agreement, which is readily available as part of the record [and stated "the Panel's acceptance of this Offer of Settlement shall resolve and terminate all complaints, investigations and audits"], it is apparent why [defendant] believed the agreement would in fact settle all claims against him"); *see also Absolute Activist Value Master Fund Ltd. v. Devine*, No. 2:15-cv-328-FtM-29MRM, 2017 WL 1830569, at *3 (M.D. Fla. May 8, 2017) (affirming magistrate judge's decision that plaintiffs did not waive privilege where "there was no indication that plaintiffs intended to rely on confidential communications in proving their claims").

The question of fair notice under the Due Process Clause centers on whether the law provides

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[7] Plaintiff cites to another case from the Northern District Court of Georgia that is similarly distinguishable from this case. *See United States v. Fresenius Medical Care Holdings, Inc.*, 2014 WL 11517840 (N.D. Ga. Feb. 21, 2014). Unlike the defendant's "theory of non-liability [in that case, which] ar[ose] out of its 'belief based on the government's knowledge of disputed activity that its conduct was lawful,'" *id.* at *2, Norwegian is not asserting here a theory of non-liability based on its beliefs.

"'an ascertainable standard of guilt' sufficient to enable ***persons of ordinary intelligence*** to avoid conduct which the law forbids." *High Ol' Times, Inc. v. Busbee*, 673 F.2d 1225, 1229 (11th Cir. 1982) (citation omitted) (emphasis added). Accordingly, the inquiry is an objective one – whether a person of ordinary intelligence would have had fair notice of liability under the law as it existed at the time that Norwegian is alleged to have trafficked in the Subject Property. Thus, through this defense Norwegian has ***not*** placed at issue its subjective knowledge of the law.

Rather, Norwegian has only alleged that it "reasonably relied on the LIBERTAD Act's continuous and serial suspension."[8] Answer and Affirmative Defenses to Am. Compl. at 18. Unlike Exxon's affirmative defense of good faith reliance on the government's regulations and communications in *United States v. Exxon Corp.*, 94 F.R.D. 246 (D.D.C. 1981), whose interpretations were found to be "highly relevant," this allegation does not concern Norwegian's subjective interpretation and understanding of the suspensions of Title III, but rather the objective state of the law. That is, the Act clearly states that the United States Government "may suspend the right to bring an action under this subchapter for additional period of not more than 6 months each." This statute, pursuant to which Title III was continuously suspended for over two decades, is sufficient evidence that an objective person of ordinary intelligence would understand that for the years Title III was suspended (that is, from the enactment of the Act until May 2, 2019), no one would be able to bring an action under the Act. Thus, it would not be "manifestly unfair" for the case to proceed without the production of privileged documents and communications between Norwegian and its counsel relating to the continuous suspensions of Title III. *See U.S. Commodity Futures Trading Comm'n*, 2015 WL 11233138, at *4 (denying plaintiff's motion to compel the production of privileged documents where neither plaintiff nor the court needed to access the privileged documents to address the issue that defendant injected into the case); *see also Blake v. Batmasian*, No. 15-CV-81222, 2017 WL 10059251, at *16 (S.D. Fla. Oct. 5, 2017), *report and rec. adopted*, No. 15-81222-CIV, 2018 WL 3829803 (S.D. Fla. Aug. 9, 2018) (finding no waiver where "[c]ontrary to Plaintiffs'

[8] Norwegian has not asserted reliance on OFAC regulations, as Plaintiff argues, but instead Norwegian's defense is that Norwegian ***complied*** with the applicable OFAC regulations. *See* Answer and Affirmative Defenses to Am. Compl. at 14 (enumerating lawful travel defenses without alleging any element of intent).

position, Defendants can advance their defenses without relying upon advice of counsel. Defendants can rely on generic trade journals or magazines, their own lay analysis, or other non-legal advice matters to attempt to prove their affirmative defenses without impliedly waiving the attorney-client privilege by issue injection"); *Jones v. RS&H, Inc.*, No. 8:17-CV-54-T-24JSS, 2018 WL 538742, at *3 (M.D. Fla. Jan. 24, 2018) (same).

As Norwegian has not put at issue "what Norwegian actually knew about these OFAC regulations and whether it truly believed that they would exempt it from liability under Title III," Motion at 11, fairness does not require that Norwegian's privileged communications be disclosed to Plaintiff. *See Cox*, 17 F.3d at 1422 ("The subject-matter waiver doctrine provides that [only when] a party who injects into the case an issue that in fairness requires an examination of communications otherwise protected by the attorney-client privilege loses that privilege.").

C. Norwegian Has Not Put At Issue Its Relationship with Its Legal Department

Norwegian has also not put at issue its relationship with its legal department by the mere fact that its legal department rendered both business and legal advice, and by its willingness to allow Plaintiff discovery into the former while maintaining privilege over the latter.

It is no secret that many in-house legal departments frequently render both business and legal advice. Of course, "not all advice rendered in a business transaction is privileged, as 'business advice which is unrelated to legal advice is not protected by the attorney-client privilege even when it is between an attorney and a client.'" *Siegmund*, 2018 WL 3725775, at *5 (citation omitted). Plaintiff's argument misses that point and assumes that just because Norwegian's legal department was involved in Norwegian's Havana business operations, the attorney-client relationship – as opposed to the business relationship – between Norwegian and its in-house counsel has been put at issue. Not so.[9]

Regarding Norwegian's defenses concerning compliance with federal law, Norwegian has produced responsive documents that pertain to the conduct of its business operations, including those

[9] Plaintiff erroneously assumes that all individuals listed in Norwegian's Initial Disclosures are going to be trial witnesses. *See Higgs v. Costa Crociere S.P.A. Co.*, 969 F.3d 1295, 1305 (11th Cir. 2020) ("[A] party's discovery obligations [under Rule 26] extend far beyond disclosure of the identities of witnesses it intends to call at trial."). To the extent that any of Norwegian's in-house counsel may testify at trial, their testimony, like the production of documents and deposition testimony to-date, would be limited to ***non-privileged*** information.

generated by its legal department. This includes documents related to coordination of berthing requests for Norwegian ships at the Subject Property, negotiations of contracts with various Cuban entities relating to its use of the port, copies of the applications for licenses from United States Government to operate in Cuba, and the operational details of Norwegian's OFAC compliance efforts. The only documents Norwegian has withheld are those that in whole or in part contain a request from or provide counsel's legal advice (*i.e.*, privileged materials). For instance, Norwegian has produced shore excursion itineraries, which Norwegian contends were OFAC-compliant; however, Norwegian has not produced Norwegian's counsel's interpretation of OFAC regulations as applied to possible shore excursion itineraries. Norwegian's objections to Plaintiff's Rule 30(b)(6) deposition notice are consistent with this approach in that, for instance, Norwegian only objected to disclosing "privileged information concerning its ***interpretation*** of the applicable laws and regulations." *See* Motion Ex. E at 6 (emphasis added).

Moreover, Norwegian's counsel is unaware of any court that has found that the length of a privilege log or the frequency with which in-house counsel appear on the log are evidence that a party has placed its attorney-client relationship at issue. *See Cox*, 17 F.3d at 1418. Plaintiff's counsel, too, are presumably unaware of any such court, as they do not cite any such case in their Motion. Relatedly, Plaintiff's assertion that Norwegian withheld "virtually all" of Mr. Vidal's records on the subjects in which he testified is patently false. Norwegian has produced 14,989 pages worth of document that were sent either to or from Mr. Vidal. Mr. Vidal's deposition testimony only concerns Norwegian's operations, including efforts to comply with federal law, ***not*** counsel's activities or interpretations – be it his, other in-house counsel's, or outside counsel's – legal advice. *See generally* Motion Ex. G, Vidal Dep.

Thus, Plaintiff has failed to establish that Norwegian waived privilege over records that reflect its knowledge of and intent to comply with the LIBERTAD Act and OFAC regulations through any position or defense that Norwegian has asserted in this action.

D. In All Events, It Would Not Be "Manifestly Unfair" to Respect Privilege

Finally, even if Plaintiff met its burden to establish an implied waiver (which it has not), that is not the end of the inquiry. Rather, under controlling precedent, Plaintiff must ***also*** show that

nonetheless, "protect[ing] against disclosure of such information ***would be manifestly unfair***" to it. *Siegmund*, 2018 WL 3725775, at *11 (emphasis in original) (quoting *Cox*, 17 F.3d 1417). Plaintiff has failed to do so, and cannot do so, for the simple reasons that it is not "unfair" to respect privilege merely because the information may be helpful or relevant to ***Plaintiff's*** affirmative case, and Norwegian does not intend to rely on any privileged information in support of its defenses.

II. Norwegian Reasonably Believed That Its Legal Communications with COMAR Were Confidential

The Court should also reject Plaintiff's conclusory arguments that Norwegian's confidential communications with COMAR, a law firm in Cuba, are not privileged because COMAR represented Norwegian at the same time it allegedly represented Norwegian's governmental counterparties in negotiating certain contracts concerning port and terminal operations. *See* Motion at 12.

COMAR is a law firm in Cuba that practices primarily in the area of maritime law. *See* Motion Ex. H, Vidal Decl. ¶ 3 (citing Vidal Dep. 19:13–14). Norwegian retained COMAR on February 10, 2016, to provide legal services to Norwegian in connection with Norwegian's carrier services to Cuba and executed a written agreement (the "Agreement") outlining the scope of the representation. *See generally* Motion Ex. H, Vidal Decl. ¶ 4 (citing Vidal Dep. 19:6–7); *see also id.* at Composite Ex. A. The purpose of the Agreement was apparent from the express terms of the document: Norwegian engaged COMAR as its legal counsel, and COMAR reciprocally promised to provide services in that capacity. *See* Motion Ex. H, Vidal Decl. at Composite Ex. A. Plaintiff does not dispute the fact that Norwegian and COMAR had established an attorney-client relationship. *See Sutton v. Seaman*, No. 13-61933, 2014 WL 12861090, at *3 (S.D. Fla. Mar. 31, 2014) (holding that an attorney-client relationship existed where the client "had a reasonable belief that an attorney-client relationship existed between himself and [the attorney]," even absent an executed agreement); Restatement (Third) of the Law Governing Lawyers § 14(1)(a) (Am. Law. Inst. 2000) (providing that an attorney-client relationship is created where "a person manifests to a lawyer the person's intent that the lawyer provide legal services for the person; and . . . the lawyer manifests to the person consent to do so"). That relationship was extended on February 12, 2018, when Norwegian and COMAR executed a supplement to the Agreement to extend the representation for two years. *See generally* Motion

Exhibit H, Vidal Decl. at Composite Ex. B.

The Agreement contemplated that Norwegian would solicit legal advice from COMAR in support of Norwegian's general operations and other matters, and that COMAR would maintain these communications and its advice confidential. Motion Ex. H, Vidal Decl. at Composite Ex. A at NCLH_23591-00568434 ("The terms of this Contract, as well as the information related with the juridical service to be rendered, will have the treatment of confidential information among the parties."). Consistent with the Agreement, COMAR represented Norwegian during Norwegian's negotiations with Aries, S.A. ("Aries"), Empresa Consignataria Mambisa, and Havanatur. *See* Motion Ex. G, Vidal Dep. 148:15–19. Throughout COMAR's representation, Norwegian made confidential disclosures to COMAR for the purpose of securing legal advice or assistance, and COMAR provided confidential legal advice and assistance. Motion Ex. H, Vidal Decl. ¶ 9; *see also In re Stickle*, No. 14-19551, 2016 WL 417047, at *4 (Bankr. S.D. Fla. Feb. 2, 2016) (recognizing that the attorney-client privilege involves "a subjective component"). In this litigation, Norwegian has provided a substantial number of documents concerning its communications with COMAR that it concedes are not privileged.[10] In turn, Norwegian has only withheld those communications with COMAR that are privileged. *See, e.g.*, Motion Ex. A, Norwegian's Privilege Log at NCLH_23591-00047544 (draft letter sent to Comar to review terms of an agreement); NCLH_23591-00078586 (requesting advice regarding impact of Cuban regulations); NCLH_23591-00078583 (requesting advice concerning negotiation of a shore excursion agreement with the Cuban government).

Plaintiff points to alleged "[e]vidence in Havana Docks' ***other*** cases" for its assertion that COMAR was representing both Aries and Norwegian simultaneously in an adverse negotiation. Motion at 12 (emphasis added). But Plaintiff admits that its imported "evidence" reveals only that "the Cuban Government appointed COMAR as the cruise lines' representatives in connection with their negotiations with the Cuban Government." *Id.* Plaintiff offers no evidence that the same COMAR attorneys were representing both Aries and Norwegian. Instead, the uncontested evidence shows that Norwegian consulted COMAR for the purpose of obtaining legal advice and under the

[10] Norwegian has produced 191 documents (1,030 pages) to and/or from COMAR and withheld, in whole or in part, only 234 documents (269 pages).

belief that its communications with those COMAR attorneys would be kept in confidence. Motion Ex. H, Vidal Decl. ¶ 9; *id.* at Composite Ex. A at NCLH_23591-00568434.

Although Plaintiff's argument fails for that reason alone, Plaintiff itself offers an alternate basis for rejecting it. Even assuming, without supporting evidence, that COMAR was representing Norwegian and Aries simultaneously and without Norwegian's knowledge, Plaintiff concedes that it "has found no authority" for its position that Norwegian could not have reasonably believed its communications with COMAR were confidential. Motion at 12. The explanation for Plaintiff's inability to find authority is simple: the authority points in the opposite direction. As one federal court has explained:

> The guiding principle in determining whether or not there exists a privileged attorney-client relationship is ***the intent of the client.*** The key question in determining the existence of a privileged communication is "whether the client reasonably understood the conference to be confidential."

Kevlik v. Goldstein, 724 F.2d 844, 849 (1st Cir. 1984) (emphasis added) (citation omitted). The rationale for assessing confidentiality from the client's vantage is clear. The purpose of the attorney-client privilege is "to encourage clients to make a full disclosure to their attorneys." *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981) (citation omitted). Thus, once a client has retained counsel, "he is entitled to peace of mind, and need not take the risk of a deception." 8 John Henry Wigmore, *Evidence in Trials at Common Law* §2302 (John T. McNaughton ed., 1961). Plaintiff contradicts these black-letter principles by requiring Norwegian to have assumed the risk that its lawyers may violate core ethical duties without Norwegian's knowledge.

Many federal courts have held that the attorney-client privilege applies where the client holds a reasonable subjective belief about a fact necessary to establish the privilege, even if the client later turns out to have been mistaken. *See In re Grand Jury Subpoena Duces Tecum*, 112 F.3d 910, 923 (8th Cir. 1997) ("[C]ourts have found the privilege applicable where the client reasonably believed that a poseur was in fact a lawyer, reasonably believed that a lawyer represented the client rather than another party, or reasonably believed that a conversation with a lawyer was confidential."). Courts have also held that a client's testimony that she intended her communications with her lawyer to be confidential is presumptive evidence that the privilege applies. In *United States v. Moscony*, 927 F.2d

742 (3d Cir. 1991), the court held that where the clients "testified that . . . they intended their communications to [their attorney] to be in confidence" and the communications "were clearly intended to facilitate [the] rendition of legal services," the communications "were *prima facie* protected from disclosure by the attorney-client privilege." *Id.* at 752.

As in *Moscony*, the evidence here is that Norwegian intended that the relevant communications between Norwegian and COMAR remain confidential. Motion at Ex. H, Vidal Decl. ¶ 9; *see also id.* at Composite Ex. A at NCLH_23591-00568434. And as in *Moscony*, the evidence indicates that the communications were "intended to facilitate [COMAR's] rendition of legal services." *Moscony*, 927 F.2d at 752. Thus, as in *Moscony*, Norwegian's intentionally confidential communications with its counsel are protected by attorney-client privilege. *See id.*; *see also United States v. Schaltenbrand*, 930 F.2d 1554, 1562 (11th Cir. 1991) (applying the privilege because the client "intended to make his communications confidentially for the purpose of securing legal advice").

Lastly, Plaintiff's unsupported argument that COMAR's alleged affiliation with the Cuban government destroys confidentiality falls flat for yet another reason. The Restatement (Third) of the Law Governing Lawyers expressly "follows the decisions of most evidence codes and decisions in defining 'lawyer' broadly to include a person admitted to practice law anywhere." Restatement (Third) of the Law Governing Lawyers § 72 Rep. note cmt. e (Am. Law. Inst. 2000). The Restatement also makes clear that the modern rule "do[es] not require that the lawyer's home country recognize the privilege." *Id.* There are two important justifications for applying these principles. First, the modern "avoids choice-of-law problems that otherwise would arise concerning the scope of a lawyer's authority to function as a lawyer in a multistate practice context." *Id.* And second, "[b]ecause the privilege focuses on a lay client's reasonable belief, it would be incongruous to protect the client's intended confidences only if the law of another state or nation recognizes the privilege." *Id.* For these reasons the Court should reject Plaintiff's invitation to scrap the attorney-client privilege just because an attorney renders services in a country with a legal system different than our own. *See id.*; *Mitts & Merrill, Inc. v. Shred Pax Corp.*, 112 F.R.D. 349, 352 (N.D. Ill. 1986) (upholding the privilege as to communications with a German patent agent).

Because Norwegian reasonably believed that its communications with its counsel were

confidential, there is no basis to compel production of its privileged communications with COMAR.

III. Norwegian's Communications with CLIA Members and CLIA Are Privileged Under the Common Interest Doctrine

Plaintiff's argument that Norwegian must divulge its communications with CLIA (an industry trade association) and its members, including Norwegian's own subsidiaries, fails for at least three reasons. ***First***, decisions of courts within this Circuit foreclose Plaintiff's argument that Norwegian must establish that Norwegian is a member of CLIA for the privilege to apply. ***Second***, Norwegian's communications with CLIA members meet the standard of the common-interest privilege. ***Third***, Plaintiff's argument that Norwegian has no standing to assert privilege on behalf of its subsidiaries is based both on a false allegation of fact and a mischaracterization of law.

Norwegian owns three individual cruise brands: Regent Seven Seas Cruises, Oceania Cruises, and Norwegian Cruise Lines. Motion Ex. K, Kaye Decl. ¶ 4. Each of these three subsidiaries is a member of CLIA and executed a written common legal interest agreement with other CLIA members. *Id.* ¶¶ 5–9; *id.* at Composite Ex. A; Motion Ex. L, Vidal Decl. ¶ 2. That agreement provides:

> It is the desire, intention, and mutual understanding of the Parties hereto: (a) that the sharing of Privileged Information among one another is not intended to, and shall not, waive or diminish the confidentiality of such materials or their continued protection under the attorney-client privilege, work product doctrine or other applicable privileges, protections or immunities.

Motion Ex. K, Composite Ex. A at 1; Motion Ex. L, Vidal Decl. ¶ 8.

Plaintiff argues, without citation to a single authority, that the common-interest agreement entered into by NCLH's subsidiaries should be afforded no weight. That argument is contrary to law. First, a written agreement is not even necessary to establish the common interest privilege. *Guarantee Ins. Co. v. Heffernan Ins. Brokers, Inc.*, 300 F.R.D. 590, 596 (S.D. Fla. 2014). But "[w]here, as here, the affected parties enter into a written agreement to pursue a common interest or interests, the claim that shared information is protected is bolstered." *Sacred Heart Health Sys., Inc. v. Humana Military Healthcare Services, Inc.*, No. 3:07cv62MCR/EMT, 2012 WL 12960898, at *4 (N.D. Fla. Jan. 31, 2012). Thus, the common interest agreement warrants judicial deference, not skepticism.

Plaintiff also argues that because Norwegian's brands – as opposed to Norwegian – executed the common-interest agreement, Norwegian's communications with CLIA and its members are not

protected. But courts in this Circuit have expressly rejected the notion "that attorney-client privilege is . . . waived merely because the communications involved extend across corporate structures to encompass parent corporations, subsidiary corporations, and affiliated corporations." *Holquin v. Celebrity Cruises, Inc.*, No. 10-20215-CIV, 2010 WL 6698221, at *2 (S.D. Fla. July 22, 2010) (citation omitted). Rather, communications between a parent and subsidiary are privileged as long as "the parent and subsidiary companies share a legal interest." *Real Estate Indus. Sols.*, 2012 WL 12903171, at *7 (quoting *Mitsui Sumitomo Ins. Co. v. Carbel, LLC*, No. 09-21208, 2011 WL 2682958, at *4 (S.D. Fla. July 11, 2011)). Further, the common interest privilege "can be invoked where multiple parties share a common legal interest about a legal matter – such as potential parties to prospective litigation." *Sacred Heart*, 2012 WL 129660898, at *4. In this case, Norwegian is the holding company for all three individual brands, and Norwegian and its subsidiaries share a common legal department that they relied on to represent their interests at CLIA. Moreover, Plaintiff has sued Norwegian for the conduct of the three brands and continuously sought discovery concerning the same from Norwegian. That is a textbook common interest arrangement. *See Mitsui Sumitomo*, 2011 WL 2682958, at *5 (holding that the privilege applied to communications where companies were potential co-parties to litigation).

Plaintiff cites *United States v. Am. Soc. of Composers, Authors & Publishers*, 129 F. Supp. 2d 327 (S.D.N.Y. 2001), for the principle that "[t]he mere status of being a member of an unincorporated association no longer makes one a client of the association's attorneys." Motion at 15. Importantly, however, Plaintiff acknowledges that the question of whether an association member is a client of an association lawyer requires a "case by case" analysis. *Id.* And this is not a case where Norwegian or its subsidiaries are "mere . . . member[s]" of CLIA. Rather, Norwegian is the parent company of three CLIA members that themselves are parties to a written common-interest agreement. Motion Ex. K, Kaye Decl. ¶¶ 4–9. Norwegian and its brands relied on the protection of the attorney-client privilege in collaborating with CLIA's counsel to formulate legal strategy. *See id.* ¶¶ 9, 14. Thus, the privilege should apply. *See Sacred Heart*, 2012 WL 129660898, at *4 (holding that a party's privilege claim was "bolstered" by the fact of a written common interest agreement and applying the privilege to communications between parties with common interest agreement); *Pensacola*

Firefighters' Relief Pension Fund Bd. of Trustees v. Merrill Lynch Pierce Fenner & Smith, Inc., No. 3:09cv53/MCR/MD, 2011 WL 3512180, at *7 (N.D. Fla. July 7, 2011) (applying the privilege on the ground that communicants "had a valid joint defense agreement" and "the communications were made for the purpose of devising and executing a common defense strategy").

Finally, Plaintiff argues that Norwegian does not have standing to assert privilege on behalf of its subsidiaries on the misleading ground that Norwegian did not search for or produce documents from those companies. That argument is both factually and legally infirm. Norwegian ***has*** produced documents from ***all three*** subsidiaries that are in Norwegian's possession, custody, and control. Norwegian has also produced many documents involving communications with CLIA and has withheld only confidential communications. *Compare* NCLH_23591-00051539 (produced email sent to, among others, CLIA's counsel and Norwegian's counsel that merely shared a press release concerning Title III) *with* NCLH_23591-00539381 (withheld email discussing advice from CLIA's counsel on the impact of federal regulations on NCLH operations). The fact that communications cross the corporate boundary between parent and subsidiary does not defeat the privilege. *See Holquin*, 2010 WL 6698221, at *2; *Real Estate Indus. Sols.*, 2012 WL12903171, at *7.

For these reasons, the Court should deny Plaintiff's motion to compel the production of Norwegian's privileged and protected documents with CLIA and CLIA members.

IV. Both the CLIA and Non-CLIA Communications with Lobbyists Are Privileged and/or Work-Product Protected

Plaintiff fails to assert factual or legal support for the premise that otherwise privileged and/or work-product protected communications lose protection merely because a lobbyist is included.[11]

The mere fact that a lobbyist was copied on an email does not transform a communication about legal advice into one about political strategy. In *Hope for Families & Community Service, Inc. v. Warren*, No. 3:06-CV-1113-WKW, 2009 WL 1066525 (M.D. Ala. Apr. 21, 2009), the court upheld

[11] As the Court suggested, Norwegian provided Plaintiff with a list of the documents on its Privilege Log to which each noticed issue pertains. To be clear, the entries identified with respect to "Issue 5" were *not* identified because they are lobbying communications. Rather, Norwegian identified those entries as responsive to "Issue 5" because Plaintiff continues to challenge these documents not because of their content, but rather because of the mere involvement of the lobbyists themselves. Accordingly, this list of "Issue 5" documents is a list of communications in which a lobbyist was included.

claims of privilege over communications to which a non-employee lobbyist was a party because the communications were made in the context of a common interest legal relationship. *Id.* at *17. As Plaintiff acknowledges, "the vast majority" of supposedly "lobbying" documents over which NCLH has claimed privilege "involve CLIA." Motion at 18. As in *Hope for Families*, and as explained above, Norwegian was involved in a common-interest relationship with CLIA and worked with CLIA and its members to formulate legal strategy. Thus, as in *Hope for Families*, Norwegian's claim of privilege and/or work-product over CLIA-related documents should be upheld.

Plaintiff also challenges Norwegian's assertion of privilege and work-product over communications with lobbyists that do not involve CLIA. Again, Plaintiff makes bare assertions that because lobbyists were included in various communications, some involving Bill Delahunt, who is also an attorney, those documents must have been for the sole purpose of coordinating political strategy. *See* Motion at 20. Again, *Hope for Families* is instructive, as that court upheld claims of privilege over communications between a company's lawyers and an outside lobbyist because the primary purpose of the communications was for the rendition of legal advice. 2009 WL 1066525, at *11. The court reasoned that because the lobbyist "possessed important information not known to others that, if communicated with [the company's] attorneys, would assist them in providing more effective representation to [the company] in pursuit of the common goal shared by [the company], its attorneys, and [the lobbyist]," the communications were privileged. *Id.* Norwegian has withheld only select communications involving lobbyists only when they pertained to the rendition of legal services and released all other lobbying communications. [12]

Thus, the Court should not compel the production of Norwegian's privileged and work-protected communications involving lobbyists.

CONCLUSION

For the foregoing reasons, the Court should enter an Order denying Plaintiff's Motion.

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[12] Plaintiff argues that "Havana Docks produced its lobbying records," but neglects to state that it withheld communications with lobbyists that it asserts are attorney-client or work-product protected. *See, e.g.*, Plaintiff's Privilege Log at REV0024258 (logging communication with lobbyists Jose Cardenas, Jonathan Slade, and Otto Reich and describing it as a "[c]ommunication regarding damages under Helms Burton Title III lawsuit"), REV0018866 (logging communication with the same lobbyists and describing it as a "[c]ommunication discussing Title III cause of action and lawful travel exception").

Dated: January 22, 2021.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on January 22, 2021, the foregoing was filed with the Clerk of Court using CM/ECF, which will serve a Notice of Electronic Filing on all counsel of record.

By: */s/ Allen P. Pegg*
Allen P. Pegg