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 PLAINTIFF'S MOTION TO COMPEL

This cause is before the Court on Havana Docks Corporation's ("Plaintiff") Motion to Compel Production of Evidence Withheld Under the Attorney-Client Privilege and Work Product Doctrine. ECF No. 128. Defendant Norwegian Cruise Line Holdings, LTD., ("NCL" or "Defendant") filed a Response, ECF No. 139, and Plaintiff further filed a Reply, ECF No. 144. The Court determined an *in camera* review of certain documents was necessary related to the second category of documents challenged, and as per the Court's Interim Order, ECF No. 157, Defendant submitted a sample of 20 documents, as discussed in further detail below. Upon consideration of the Motion, Response, Reply, the *in camera* documents, oral argument and being otherwise apprised in the matter, Plaintiff's Motion to Compel is **GRANTED in part, and DENIED in part**.

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 NCL 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). It further requires the offending party to have "knowingly and intentionally" trafficked in the confiscated property. *Id.*

Defendant contends its travel to Havana was 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. Among other challenges, Plaintiff contests the availability of the lawful travel defense to NCL, which indisputably also traveled on the general license to other ports in Cuba. Plaintiff further challenges Defendant's contention that use of the port in Havana was "necessary" because Defendant had alternative means of disembarking passengers, for example, anchoring offshore.

According to Plaintiff, the contested documents at issue in this Motion relate to and would reveal Defendant's knowledge and state of mind regarding its use of Plaintiff's Subject Property.

b. Plaintiff's Motion to Compel

On January 15, 2021, Plaintiff filed the instant Motion to Compel documents withheld by Defendant under attorney-client privilege and attorney work product. ECF No. 128. First, Plaintiff argues that Defendant waived privilege by putting at issue its knowledge of and intent to comply with the Act and Office of Foreign Asset Control ("OFAC") regulations.

Second, Plaintiff argues that Defendant must disclose otherwise responsive communications with Consultores Maritimos S.A. ("COMAR"), since, as an extension of the Cuban government, Defendant's expectation of confidentiality in such communications was unreasonable under the circumstances. *Id*. at 12-13. Plaintiff claims that (1) private parties inherently have no expectation of confidentiality over conversations with attorneys of a communist government; and (2) party communications with an attorney representing both sides of a negotiation (as Plaintiff claims COMAR did) are not confidential. *Id.* at 13-14.

Third, Plaintiff contends that Defendant's exchanges with the Cruise Lines International Association ("CLIA"), the lobbying arm of the cruise line industry, are covered by neither the work product doctrine, nor attorney-client privilege more broadly. *Id.* at 14. Plaintiff argues that (1) Defendant has not proven that it (and not simply its subsidiaries, over which Plaintiff claims it has no standing to assert privilege in this action) is a signatory to CLIA and thus cannot argue that it is a "client" with a privilege to assert, *id.* at 16; and even if Defendant were a member of CLIA, (2) communications with CLIA would not be afforded attorney client privilege given that CLIA's efforts were limited to lobbying and political strategy and thus do not qualify as legal advice, even where directed toward a particular litigation, *id.* at 17; and (3) the "generic" Common Legal Interest Agreement executed amongst CLIA members is insufficient to demonstrate that Defendant shared an actual common legal interest with *all* CLIA members, many of whom did not travel to Cuba or utilize the Subject Property, *id.* at 20.

Fourth, Plaintiff contends that Defendant's privilege claim over documents and communications pertaining solely to efforts to lobby the U.S. Government is invalid, similarly arguing that lobbying work is inherently outside the scope of privilege protection, even when directed at specific litigation. *Id.* at 20.

II. DISCUSSION

a. Legal Standard

In federal question cases, privileges are determined under federal common law. Fed. R. Evid. 501. Federal Rule of Civil Procedure 26 provides that a party who withholds information otherwise discoverable by claiming that the information is privileged or protected must: "(i) expressly make the claim; and (ii) describe the nature of the documents, communications, or tangible things not produced or disclosed—and do so in a manner that, without revealing information itself privileged or protected, will enable the parties to assess the claim." Fed. R. Civ. P. 26(b)(5)(A).

The party invoking the privilege has the burden of establishing all of its essential elements. *See Campero USA Corp. v. ADS Foodservice, LLC*, 916 F. Supp. 2d 1284, 1287 (S.D. Fla. 2012). Failing to prove any one element causes the entire privilege claim to fail. *Id.* (citing *North Carolina Elec. Membership Corp. v. Carolina Power & Light Co.*, 110 F.R.D. 511, 515 (M.D.N.C. 1986)). Conclusory assertions will not suffice; the party asserting the privilege must offer "underlying facts demonstrating the existence of the privilege, which may be accomplished by affidavit." *Id.* (citations omitted). However, "[u]nless the affidavit is precise to bring the document within the rule, the Court has no basis on which to weigh the applicability of the claim of privilege. An improperly asserted claim of privilege is no claim of privilege at all." *Id.* (quoting *International Paper Co. v. Fibreboard Corp.*, 63 F.R.D. 88, 94 (D. Del. 1974)); *see also Bridgewater v. Carnival Corp.*, 286 F.R.D. 636, 639 (S.D. Fla. 2011).

The attorney-client privilege relies on the tenet that "sound legal advice or advocacy ... depends upon the lawyer's being fully informed by the client," and is designed to "encourage full and frank communication between attorneys and their clients and thereby promote broader public

interests in the observance of law and administration of justice." *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981). In order for the privilege to attach, the party asserting it must show:

> (1) the asserted holder of the privilege is or sought to become a client; (2) the person to whom the communication was made (a) is [the] member of a bar of a court, or his subordinate and (b) in connection with this communication is acting as a lawyer; (3) the communication relates to a fact of which the attorney was informed (a) by his client (b) without the presence of strangers (c) for the purpose of securing primarily either (I) an opinion of law or (ii) legal services or (iii) assistance in some legal proceeding, and not (d) for the purpose of committing a crime or tort; and (4) the privilege has been (a) claimed and (b) not waived by the client.

Doe v. Sch. Bd. of Miami-Dade Cty, No. 18-25430-CIV, 2020 WL 1305025, at *1 (S.D. Fla. Mar. 19, 2020) (quoting *In re Grand Jury Proceedings 88-9 (MIA)*, 899 F.2d 1039, 1042 (11th Cir. 1990)). The privilege is an "obstacle to the investigation of the truth." *Cox v. Adm'r U.S. Steel & Carnegie*, 17 F.3d 1386, 1414 (11th Cir. 1994) (citations omitted), *opinion modified on reh'g*, 30 F.3d 1347 (11th Cir. 1994). Therefore, the burden to sustain a claim of privilege is a heavy one; privileges must be strictly construed and accepted only to the limited extent that "excluding relevant evidence has a public good transcending the normally predominant principle of utilizing all rational means for ascertaining truth." *Bridgewater*, 286 F.R.D. at 639 (citations omitted).

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)). Work-product is governed by the uniform federal standard of Fed. R. Civ. P. 26(b)(3). *Diamond Resorts U.S. Collection Dev., LLC v. US Consumer Attorneys, P.A.*, No. 9:18-CV-80311, 2021 WL 505122, at *4 (S.D. Fla. Feb. 11, 2021). Designed to protect 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)," 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). Similar to maintaining a claim for attorney-client privilege, 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*, 2021 WL 505122, at *7 (citing *MapleWood Partners, L.P. v. Indian Harbor Ins. Co*., 295 F.R.D. 550, 584 (S.D. Fla. 2013)).

b. Analysis

i. Documents Reflecting Defendant's Knowledge of, and Intent to Comply With, the Act or OFAC Regulations

Plaintiff argues that Defendant has put at issue its subjective thoughts, beliefs and knowledge of the legality of its conduct in Cuba and cannot now, without prejudice to Plaintiff, invoke privilege to prevent Plaintiff from examining the veracity of Defendant's defenses and assertions. Specifically, Plaintiff argues that the following put Defendant's subjective knowledge at issue: (1) Defendant's Lawful Intent Defense; (2) Defendant's Fair Notice and Government Reliance Defense; and (3) references Defendant has made to advice received from its in-house legal department.

As articulated by the Court in *In re Namenda Direct Purchaser Antitrust Litigation*, No. 15CIV7488CMJCF, 2017 WL 2226591 (S.D.N.Y. May 19, 2017), a party may waive the protection of privilege if it "asserts a factual claim the truth of which can only be assessed by examination of privileged communication, even if he does not explicitly rely on that communication." *Id.* at *3 (citations omitted). As relevant here, a party may be deemed to have *implicitly* relied on legal advice where it asserts as part of a claim or defense that it in good faith believed its conduct at the time to be lawful; thus using privileged advice as a sword. *Id*. The

party may not then subsequently block inquiry into the basis for that belief by claiming that otherwise responsive documents are privileged; thus using privileged advice as a shield. *Arista Recs. LLC v. Lime Grp. LLC*, No. 06 CV 5936 KMW, 2011 WL 1642434, at *2 (S.D.N.Y. Apr. 20, 2011). Fairness dictates that the party either disclose the documents in question—thus waiving privilege—or waive its right to rely on its good faith defense at trial. *Id*.

Arista is particularly instructive of how this unfolds further along in the pretrial process; plaintiffs there filed a motion *in limine* to preclude defendants from introducing at trial arguments and testimony to which they previously denied plaintiffs access, claiming they were privileged. *Id*. Because this deprived the plaintiffs of access to information that might disprove or undermine defendants' contentions, the court granted the motion and precluded defendants "from offering evidence or argument at trial into their purported believe in the lawfulness of their conduct." *Id.* at *3. Here, then, the question is first whether Defendant put its subjective beliefs at issue and, if it did, whether doing so waives its privilege to withhold documents relevant to that subjective belief.

1. Defendant's Lawful Intent Defense

Plaintiff asserts that Defendant's lawful intent defense is little more than Defendant's attempt to offer a restyled "defense of good faith." Plaintiff notes that in Defendant's Motion to Dismiss briefing, ECF Nos. 31, 41, and Answer, ECF No. 107, Defendant argued that a determination of its liability should be "tethered to state of mind rather than conduct" and that the available evidence showed Defendant's intent to comply with the Act and its safe-harbor provision, ECF No. 128 at 6-7. Consistent with this argument, Defendant's President and CEO Frank Del Rio and its Corporate Representative Mario Parodi testified in their respective depositions that Defendant always believed it was operating within the permissible bounds of the

Act and the OFAC regulations. *Id.* at 7. Plaintiff avers that Defendant has withheld as privileged the evidence reflecting what it knew about the legality of its conduct and argues further that it has reason to question the veracity of Defendant's statements regarding its "state of mind"; Plaintiff notes that Defendant's privilege log contains 11,007 privilege entries, many of which related to the Act and OFAC regulations, stating that the "sheer volume" of entries suggests that Defendant had "significant concerns about its compliance." *Id*.

In response, Defendant argues that *Cox*—a case both Parties rely on—demonstrates that it has not waived privilege because Defendant "does not intend to present evidence that it intended to comply with the law, even though [Defendant] denies that it intended to violate the law." ECF No. 139 at 5 (citing *Cox*, 17 F.3d at 1419). At oral argument on the Motion, Defendant reiterated that, unlike the defendant in *Cox*, its lawful travel defense would not implicate evidence regarding Defendant's subjectively held beliefs, rather, the argument is that Defendant actually complied with the law; whether it subjectively believed it was in compliance is, although true, beside the point. In clarifying its position, Defendant represented that it *would* offer testimony that the Cuban government told Defendant it could utilize the port in question as a factual matter and that Defendant relied on the issuance of the licenses, but it *would not* state that it received legal advice or that it examined the law and relied on counsel's advice in asserting that its actions were lawful.

Defendant distinguishes its legal position from that which formed the basis of waiver in *Cox*. In *Cox*, the defendant consistently relied on the subjective belief in the legality of its actions, while Defendant NCL, by contrast, affirmatively avers that it does *not* intend to rely on evidence of its subjective belief at trial and supports this statement by noting that the arguments on which Plaintiff here relies are from Defendant's first motion to dismiss, and these arguments were not re-raised in its subsequent motion to dismiss. Defendant also points out that, like the defendant in

Knox, it has not asserted an "advice-of-counsel" defense, which the court in *Knox* found significant. ECF No. 139 at 4 (citing *Knox v. Roper Pump Co.*, 957 F.3d 1237, 1249 (11th Cir. 2020)).

The attorney-client privilege protects disclosures made in confidence by a client to her attorney for the purpose of securing legal advice, and this may be waived "either expressly or by implication." *Knox*, 957 F.3d at 1248 (citing *Cox*, 17 F.3d at 1417). The principle underpinning this doctrine of waiver by implication is that the attorney-client privilege "was intended as a shield, not a sword," and defendants are precluded from wielding the privilege to "prejudice his opponent's case or to disclose some selected communications for self-serving purposes." *Id.* (citing *Cox*, 17 F.3d at 1417). A party therefore implicitly waives attorney-client privilege when it places privileged information at 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." *Id.* (citations omitted). Waiver requires more than mere denial of a plaintiff's allegations, however; the holder "must inject a new factual or legal issue into the case." *Cox*, 17 F.3d at 1417 (citing *Lorenz v. Valley Forge Ins. Co*., 815 F.2d 1095, 1098 (7th Cir.1987)). The burden rests on the party asserting the privilege to prove that, once established, the privilege was not subsequently waived. *United States v. Patel*, No. 19-CR-80181, 2020 WL 7973941, at *2 (S.D. Fla. Dec. 23, 2020).

In *Cox*, the Eleventh Circuit drew a distinction between what the defendant could have done—denying criminal intent in the context of a statute requiring a willful violation of the law—and what the defendant ultimately did, which was to "go beyond mere denial" and instead "affirmatively assert good faith." *Cox*, 17 F.3d at 1419. In doing so, the defendant injected the issue of its knowledge of the law into the case and the court found it "would be inequitable to allow

[defendant] 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*. at 1418. Indeed, the question of affirmative assertion is key, given that the inquiry here is whether the Defendant is using the question of its legality, and what it believed about its legality, as a sword or a shield.

This Court's prior analysis in *Siegmund v. Xuelian Bian*, No. 16-CV-62506, 2018 WL 3725775, at *12 (S.D. Fla. Aug. 1, 2018), is instructive on this point. There, the statute in question included a "good faith" requirement, and the defendants asserted compliance with the statute. I found that it simply could not be so that the inclusion of good faith as a statutory element would "automatically translate into an affirmative assertion of good faith reliance on counsel's advice," and this was particularly true where the defendants had not, and warranted that they would not, assert a "reliance on the advice of counsel defense." *Id*. Consider, in contrast, *Maar v. Beall's Inc.*, 237 F. Supp. 3d 1336, 1340 (S.D. Fla. 2017), in which the defendant stated that it "acted in good faith *and with reasonable grounds for believing its actions fully complied with the law*." (emphasis added). The court found the defendant implied waived attorney-client privilege in *Maar* because its defense explicitly relied on the "litigant's subjective thinking, as potentially influenced by advice from legal counsel." *Id.* Put differently, the defendant's claims about what it subjectively believed crossed the threshold from defensive to offensive.

The Act states that, in order to trigger liability, the offending party must have "knowingly and intentionally" trafficked in the confiscated property. 22 U.S.C. § 6023(13). To find a waiver occurred here, Defendant would need to do more than merely assert that it did *not* act knowingly and intentionally, as this would simply be an averment that Defendant complied with the law. Plaintiff insists, however, that Defendant has placed at issue its subjective thinking, citing

statements made by Defendant in depositions that were, at least for one witness, prompted by questions from Plaintiff's counsel regarding whether the representatives were concerned with compliance under the Act. For example, Plaintiff asserts that Del Rio testified that he believed Defendant was operating at all times legally. ECF No. 132-9 at 53:11-57:3. Del Rio was, however, responding to questions from Plaintiff regarding whether he was concerned with liability under the Act. *Id.* at 54:9-14, 55: 16-20. Plaintiff then notes that Parodi testified that Defendant "never thought [it] w[as] doing anything illegal." ECF No. 129-4 at 63:5-64:12. The Court finds that these isolated, responsive statements made during the course of deposition testimony are not enough to support an inference that Defendant intends to make a legal argument about its subjective beliefs, especially when, as here, Defendant warrants that it will not introduce evidence or arguments regarding what it subjectively believed about the legality of use of the Subject Property, nor will it raise an advice of counsel defense. *See Knox*, 957 F.3d at 1249 ("Most importantly, the defendants did not assert an advice-of-counsel defense.").

2. Defendant's "Fair Notice" and Government Reliance Defense

Plaintiff avers that Defendant's claim that it did not have fair notice of liability under Title III and that it relied on actions by the federal government—in terms of regulations and the licenses issued, as well as government encouragement to travel to Cuba and accompanying inaction—to conclude that no liability would attach to its actions necessarily implicates Defendant's subjective understanding of the law. ECF No. 128 at 9-10 (citing Defendant's Motion to Dismiss the Amended Complaint, ECF No. 66, and Defendant's Answer and Affirmative Defenses, ECF No. 107). Plaintiff argues that, for fairness reasons, it must be able to examine what Defendant actually knew about the OFAC regulations and whether Defendant "truly believed" the regulations would render it immune from liability. *Id.* at 11.

Defendant, in response, argues that its fair notice argument made under the Due Process Clause necessitates only an objective, and not a subjective, inquiry into whether "a person of ordinary intelligence would have had fair notice of liability under the law as it existed" at the time of Defendant's alleged trafficking. ECF No. 139 at 9-10 (quoting *High Ol' Times, Inc. v. Busbee*, 673 F. 2d 1225, 1229 (11th Cir. 1982)). Defendant avers that the Act's statement that the United States government "may suspend the right to bring an action under this subchapter for additional periods of not more than 6 months each," coupled with the fact that Title III was indeed suspended continuously for more than 20 years, would be sufficient to permit an objective person of ordinary intelligence to conclude that, during the time the Act was suspended, no liability would attach. *Id.* at 10. Distinguishing its case from *United States v. Exxon Corporation*, 94 F.R.D. 246 (D.D.C. 1981), on which Plaintiff relies in its Motion, Defendant notes that the court there found the evidence supporting Exxon's *good faith* reliance on government guidelines was key and thus required discovery of Exxon's internal conversations that would show whether or not that reliance was, in fact, in good faith. ECF No. 139 at 10. Plaintiff argues in its Reply that Defendant actually intends to use this objective evidence to permit the inference that it subjectively relied on the government regulations, inaction, and encouragement. ECF No. 144 at 4.

Without unnecessarily delving into the merits of Defendant's due process claim, I find that the inquiry here is an objective one; the relevant question considers the sufficiency of the government's actions, not how Defendant may have interpreted them. *See, e.g.*, *Stardust, 3007 LLC v. City of Brookhaven*, 899 F.3d 1164, 1176 (11th Cir. 2018) ("All ... due process ... requires is fair notice ... sufficient to enable persons of ordinary intelligence to avoid conduct which the law forbids." (citing *High Ol' Times, Inc.*, 673 F.2d at 1229). Defendant's argument proceeds on the theory that the government's actions were insufficient to put *anyone* on notice that they would

be subject to liability under the Act. Defendant's subjective belief as to whether it could be held liable under the Act has not been placed at issue, and to hold otherwise would blur the line between Due Process considerations and a "defense of good faith." Defendant's Due Process argument thus did not waive privilege.

3. *Defendant's Relationship with its Legal Department*

Plaintiff avers that Defendant put its relationship with its in-house legal counsel "at the heart of this case" primarily because Defendant's General Counsel, Dan Farkas and Lincoln Vidal, "coordinated the berthing requests for [Defendant] ships at the Subject Property, negotiated contracts with the Cuban Government relating to its use of the port, prepared applications for licenses from United States government to operate in Cuba, and participated in [Defendant's] OFAC compliance program." ECF No. 128 at 11. In response, Defendant argues that its legal counsel assists with a mix of both business and legal issues, and that it provided Plaintiff with discovery into the former while withholding the latter on the basis of attorney-client privilege. ECF No. 139 at 11 (citing *Siegmund*, 2018 WL 3725775, at *5). Notably, Plaintiff does not argue that Defendant wrongfully characterized documents pertaining to business advice as legal advice in its privilege log; rather, Plaintiff avers that Defendant has waived attorney-client privilege over documents pertaining to legal advice entirely because these business actions are central to the underlying dispute.

While I acknowledge that Defendant carries the burden here, Plaintiff cites no case to support its contentions, and indeed, this Court knows of none that would stand for the proposition that the provision of both business and legal advice by counsel somehow waives privilege over documents whose primary purpose is the provision of legal advice. In accordance with my findings above, I find that Defendant, simply by virtue of the fact that its counsel performs dual business

and legal functions, did not waive privilege over records reflecting its knowledge and intent to comply with the Act and OFAC regulations.

ii. Defendant's Expectation of Confidentiality Over its Communications with the Cuban Government

Plaintiff next argues that Defendant had no reasonable expectation of confidentiality regarding its communications with COMAR, a department of the Cuban government that specializes in maritime law and represents Aries Transportes, S.A. ("Aries"), the Cuban governmental agency that operates the Subject Property. ECF No. 128 at 12. Defendant retained COMAR in part to represent it in contract negotiations with certain arms of the Cuban government, including Aries, Empresa Consignataria Mambisa ("Consignataria"), and Havanatur. *Id.* at 13. Plaintiff contends that COMAR was appointed to represent Defendant by the Cuban government. Plaintiff offers in support of this argument evidence obtained through litigation with another cruise line. *Id.* Plaintiff avers that Defendant (1) had no expectation of confidentiality in its communications with COMAR in the first instance as an arm of the communist government of Cuba, and (2) even were that not the case, here, Defendant particularly had no expectation of confidentiality because the same Cuban Government attorneys represented parties on both sides of the negotiation. *Id.*

In support, Plaintiff asserts that it has not found any precedent suggesting a party *would* have a reasonable expectation of confidentiality over communications with a communist government, nor has it found any instance where a court found confidential communication with an attorney who represented both parties to a negotiation. *Id.* (adding that "[i]f anything, case law appears to support the opposite," citing a portion of *Trinity Amb. Serv., Inc. v. G&L Amb. Serv., Inc.*, 578 F. Supp. 1280, 1285 (D. Conn. 1984), which opines on the expectations of confidentiality when divulging information to a co-party's attorney).

In response, Defendant asserts its relationship with COMAR was that of attorney and client, and it provided confidential information to COMAR for the purpose of obtaining legal advice. As support, Defendant cites a signed retainer agreement with COMAR, in which COMAR ostensibly offers to provide Defendant legal services. ECF No. 139 at 13 (citing ECF No. 132-3 (February 10, 2016 Service Contract)). Defendant highlights a contract provision that states that information related to the provision of services will be granted confidential treatment. *Id.* at 14. Defendant further offers sworn testimony from its in-house counsel, who declares that Defendant "has made disclosures, in confidence, to COMAR for the purpose of securing legal advice or assistance, and COMAR has provided such legal advice and assistance." ECF No. 132-3 (Vidal Declaration) ¶ 9. Defendant acknowledges that not all of its communications involving COMAR are privileged, noting that it produced 191 documents (1,030 pages), and withheld either in whole or in part 234 documents (269 pages). *Id.*

Defendant argues that Plaintiff does not challenge that COMAR and Defendant maintained and attorney-client relationship, *id.* at 13, and asserts that Plaintiff offers no evidence that "the same COMAR attorneys were representing both Aries and [Defendant]," *id*. at 14. And, adds Defendant, even if COMAR was "representing [Defendant] and Aries simultaneously and without [Defendant]'s knowledge," the Court should uphold the privilege here based on Defendant's "reasonable subjective belief" that the privilege existed. *Id.* at 15. Defendant finally avers that COMAR's "alleged affiliation with the Cuban government" should not undermine the privilege claim, relying on the Restatement (Third) of the Law Governing Lawyers, which states that the term "lawyer" should be broadly construed to "include a person admitted to practice law anywhere" and that the modern rule "do[es] not require that the lawyer's home country recognize the privilege," because, in addition to avoiding choice of law problems that would arise "it would

be incongruous to protect the client's intended confidences only if the law of another stateor nation recognizes the privilege." *Id.* at 16 (quoting Restatement (Third) of the Law Governing Lawyers § 72 Rep. note cmt. e (Am. Law. Inst. 2000)).

For the reasons stated in my Interim Order, ECF No. 157, I conducted an *in camera* review and requested twenty documents as a representative sample of the withheld COMAR documents: ten were selected by the Court, and Defendant selected the other ten. *Id.* at 3. Though the Parties have raised a range of challenges and arguments with respect to Defendant's privilege claim regarding these documents, the preliminary inquiry before the Court is whether Defendant satisfied its burden to prove the advice and services provided by COMAR were, in fact, between client and attorney for the provision of legal services. *Doe v. Sch. Bd. of Miami-Dade Cty*, No. 18-25430-CIV, 2020 WL 1305025, at *1 (S.D. Fla. Mar. 19, 2020).

Upon review of the sample documents provided by Defendant, I find that it has not satisfied its burden to show that COMAR was providing *legal* services. Rather, these documents reflect a relationship in which COMAR was a liaison between Defendant and the other relevant authorities, essentially shuttling documents back and forth and reporting information to Defendant conveyed from the other contracting parties. The first document in the review exemplifies this dynamic. Described on Defendant's privilege log as "Email from Rodriguez to Vidal providing advice concerning terms of agreement for berthing," the document[1] reveals a communication from counterparty Consignataria, through COMAR, specifying which contractual terms and conditions Consignataria will agree to. COMAR representative Yoaima Rodriguez Salas, whose email signature identifies her as an "Attorney/Consultant," offers no advice or opinion on the proposals, only instructions, noting that after Defendant provides responses to the comments, COMAR will

[1] NCL_NCLH_23591-00075108.

"send the contractual proforma containing these proposals, which Consignataria will send us." That COMAR's role in these contract negotiations was that of a liaison with other Cuban entities is corroborated by the deposition testimony of General Counsel Vidal, who explained that, as in-house counsel for Defendant, *his* role was to advocate for favorable contract terms, and "then we sourced our comments through COMAR, and then they made their way back to, you know, Aries and Empresa Consignataria Mambisa." ECF No. 132-2 at 148: 8-22. Neither his testimony nor the documents examined *in camera* support a claim that COMAR offered Defendant legal advice. Rather, as Vidal further explained at deposition, Defendant recognized COMAR as tantamount to a counter-party to Defendant's contract negotiations; when asked to identify who was included on email communications on which the contracts were negotiated with the Cuban government, Vidal identified himself and perhaps a few others on one side, on behalf of NCL, and "[o]n the other side, Comar." ECF No. 132-2 at 150:20-25; 151:1-3.

Other communications in the review support an inference that COMAR's role was not limited to shuttling documents to and from NCL, but they nonetheless fail to reveal confidential communications between the Defendant and COMAR relating to the provision of legal services. For example, Vidal requested from the COMAR representative a "list of rates for the main Cuban ports."[2] COMAR representative Rodriguez replies by attaching an estimate, which she explains was provided "by *our Consignataria Mambisa colleagues*." (emphasis added). While COMAR provided Defendant with answers upon request, the communications reveal that the information in the answers was provided by the other arms of the government—including the contracting counterparties—who the COMAR representative tellingly refers to as "our … colleagues." Again, the Court's understanding of this document is informed by and consistent with the deposition

[2] NCL_NCLH_23591-00075276.

testimony of Defendant's corporate representative, who testified that COMAR is a "legal office that's an extension of the Cuban Government." ECF No. 129-4 at 124:20-22.

Finally, from another communication in 2016,[3] COMAR representative Rodriguez comments on proposed contract changes from NCL, observing that NCL's rejection of one term might hinder the negotiations between NCL and Aries, and thus she suggests that NCL reconsider its position, even noting that Vidal told her he did not anticipate any issues with the clause. While it is apparent that Ms. Rodriguez here conveyed advice, I am not prepared to find that it is anything more than business (as opposed to legal) advice, given Defendant has here failed to evidence that—despite the generalized statements offered in Vidal's declaration, addressed below—it in fact sought or received legal advice from COMAR.

To address Defendant's argument that its communications with COMAR should be afforded privileged treatment because Defendant subjectively, if erroneously, believed that COMAR was its attorneys: this is supported by no evidence, as Plaintiff notes in Reply. For litigation counsel to *argue* that NCL mistakenly believed that COMAR represented its interest without providing *evidence* that NCL did not know that COMAR represented the counterparties to the contracts is problematic, but emblematic of the larger problem in Defendant's presentation.

The privilege log descriptions for documents reviewed *in camera* are most charitably described as inaccurate but, frankly, traipse across the line into misleading territory. Take for example a document[4] described in Defendant's opposition as "requesting advice concerning negotiation of a shore excursion agreement with the Cuban government." ECF No. 146-5. This email exchange begins with the COMAR representative forwarding to Vidal proposed contracts from Havanatur, the counterparty. Vidal acknowledges the contracts and, on the following day,

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[3] NCL_NCLH_23591-00075303.
[4] NCLH_23591-00078583.

sends back to the COMAR representative redlined versions reflecting what he characterizes as "our changes," concluding his messages with a note that NCL will await response *from Havanatur*. Similarly, NCLH_23591-00047544 is described on the log as a "draft letter sent to Comar for his review and advice concerning the terms of the same." ECF No. 146-5. Setting aside the question of who is being referenced in the phrase "his review and advice," given that COMAR is an entity and the COMAR representative is a woman, this is far from a fair description of the document. Though it is indeed a letter, it contains a mere inventory of items being advanced by Defendant *at the request of Aries*, as explicitly stated in the letter itself, which opens with "[w]ith respect to the documents requested by Aries." Neither review nor advice is requested in either correspondence.

The advice and review described on Defendant's privilege log is not apparent from the withheld documents, which reveal no words expressing Defendant's request for same. To the extent Defendant contends that the solicitation of advice may be inferred from other evidence, I have found that evidence deserving of no weight. Defendant advanced the declaration of Vidal, who testified that Defendant made disclosures to COMAR for the purpose of securing legal advice and that confidential communications were made for that purpose. ECF No. 132-3 ¶¶ 9-10. His conclusory statements are insufficient to fill the gap left by the absence of any advice or confidential communication apparent from the communications themselves. Moreover, his declaration is contradicted by his cross-examined deposition testimony described above. Accordingly, I do not credit his vague claim to have made disclosures to COMAR for the purpose of seeking legal advice.

I therefore find that, to the extent Defendant is withholding documents on the basis that they are protected by an attorney-client relationship with COMAR, its claim of privilege fails, and Defendant is ordered to produce responsive documents in this category.

iii. Defendant's Communications with CLIA and CLIA Members

The common-interest privilege, also known as the joint defense doctrine, carves out an exception to the typical rule that the attorney-client privilege is waived when a party voluntarily discloses otherwise privileged information to a third party. *JTR Enterprises, LLC v. An Unknown Quantity of Colombian Emeralds, Amethysts & Quartz Crystals*, 297 F.R.D. 522, 528 (S.D. Fla. 2013) (citing *Fries v. Teaford Co., Inc.*, No. 5:12–CV–37–RS–CJK, 2012 WL 3966382, at *2–3 (N.D. Fla. Sept. 11, 2012)). The doctrine permits parties "who share unified interests to exchange privileged information to adequately prepare their cases without losing the protection afforded by the privilege." *Id.* "However, sharing a desire to succeed in an action is not enough to create a common interest where there was no evidence of an agreement, the third-party was never party to the action, and the third-party never exercised control over or contributed to legal expenses." *Id.* (citing *Shamis v. Ambassador Factors Corp.*, 34 F. Supp. 2d 879, 893 (S.D.N.Y. 1999)).

The privilege is not strictly limited to co-parties in litigation, but the parties must share a common *legal* interest, "rather than solely a common commercial or business interest." *Del Monte Int'l GMBH v. Ticofrut, S.A.*, No. 16-23894-CIV, 2017 WL 1709784, at *7 (S.D. Fla. May 2, 2017) (emphasis added) (citing *Breslow v. Am. Sec. Ins. Co.*, No. 14-62834, 2016 WL 698124, at *9 (S.D. Fla. Feb. 19, 2016)). As noted by the court in *Del Monte*, the doctrine "does not encompass a joint business strategy which happens to include as one of its elements a concern about litigation." *Id.* (quoting *Spencer v. Taco Bell, Corp.*, No. 8:12-cv-387, 2013 WL 12156093, at *2 (M.D. Fla. Apr. 23, 2013)) (internal quotation and marks omitted). The legal interest in question must be "*substantially* similar." *United States v. Patel*, No. 19-CR-80181, 2020 WL 7973941, at *3 (S.D. Fla. Dec. 23, 2020) (emphasis in original) (citations omitted). A shared interest in the outcome of litigation, or "the fact that an opponent is a common adversary, is insufficient to justify

successful invocation of the common interest doctrine." *Del Monte Int'l GMBH*, 2017 WL 1709784, at *7.

Plaintiff argues here that Defendant must produce communications with the cruise industry trade association group, CLIA, as well as communications with CLIA members, claiming that, despite the execution of a "Common Legal Interest Agreement" by Defendant's subsidiaries and other CLIA members, there is no such common legal interest present to sustain Defendants claim of privilege. ECF No. 129 at 18. Plaintiff characterizes the agreement as generic and asserts that it was drafted "without reference to any specific legal interests common to CLIA's members." ECF No. 144 at 10. Plaintiff particularly avers that Defendant cannot share a blanket common legal interest with *all* CLIA members, as the agreement purports, because many members did not ever "[step] foot in Cuba or on the Subject Property," and because such members and Defendant do not share a common interest in litigation under the Act. ECF No. 129 at 18.

Plaintiff further notes in its Reply that Defendant is neither a member of CLIA nor an actual signatory to the common legal interest agreement and thus does not have standing to assert privilege on behalf of its subsidiaries with the third-party trade association. ECF No. 144 at 9-10. While the parties disagree regarding the degree to which Defendant has permitted discovery involving its subsidiaries,[5] Defendant asserts that this is a "textbook common interest arrangement," as it is the holding company for all three individual brands and the four share "a common legal department that they relied on to represent their interests at CLIA." ECF No. 139 at 17. Further, Defendant argues that the fact that it is not a signatory to CLIA is not fatal because

[5] In its Response, Defendant argues that it "*has* produced documents from *all three* subsidiaries that are in Norwegian's possession, custody, and control." ECF No. 139 at 19 (emphasis in original). Although Plaintiff acknowledges it has sought discovery from Defendant's subsidiaries in this litigation, Plaintiff argues that, in light of Defendant's discovery objections and representations made during meet and confer sessions, Defendant is "incorrect to the extent that it implies that it actually searched those brands for responsive documents." ECF No. 144 at 10.

it is the parent of the three CLIA member subsidiaries, all of whom executed the common interest agreement, and Defendant and its brands relied on the presence of attorney-client privilege in working with CLIA to "formulate legal strategy." *Id.* at 18.

I need not, however, reach the issue of whether Defendant can assert privilege under a common interest agreement to which it is not a signatory. Defendant argues that written execution of the agreement warrants deference, but upon examination of the agreement on which Defendant relies, I find that it does not evidence a substantially similar legal interest shared by all members. While Defendant further states that it shares a legal interest with its three subsidiaries, this too misses the heart of the inquiry; the question is whether *all CLIA members*—with whom Defendant and its subsidiaries shared information—shared a substantially similar legal interest. The only evidence offered by Defendant to demonstrate a mutual legal interest is the declaration of Lawrence W. Kaye, a law firm partner who serves as the outside General Counsel of CLIA, which states that CLIA agreement acknowledges that the "common legal interests" of the parties will be best served if they can share information under the protection of privilege and that the "confidential legal advice" rendered is intended to be afforded privilege. ECF No. 132-6. This declaration and Defendant's attendant argument avers that a shared legal interest exists amongst CLIA members but does not explain what that common legal interest *is*.

Such conclusory statements are insufficient to support a claim of privilege. *Campero USA Corp.*, 916 F. Supp. 2d at 1287. Because Defendant has not shown that the CLIA members share a substantially similar legal interest, Defendant has not carried its burden here and is thus compelled to produce responsive communications with the cruise industry trade association group Cruise Lines International Association ("CLIA"), as well as responsive communications with CLIA members.

iv. Lobbying Materials

The final dispute here arises from Plaintiff's claim, based on a facial challenge of the privilege log, that Defendant is withholding responsive communications that Plaintiff avers relate to lobbying and political strategy rather than the provision of legal advice. *See* ECF No. 132-8 (listing documents deemed responsive to this issue). In response, Defendant fails to address Plaintiff's challenge, instead arguing that these are communications about legal advice on which a lobbyist "merely" happens to be copied and arguing that the act of including a lobbyist does not "transform the communication into one about political strategy." ECF No. 139 at 19-20. Defendant's argument, however, assumes that the documents in question are privileged in the first place.

Defendant's assumption that this list of documents is privileged arises from its significant overlap with the CLIA-related documents. I have already found, as discussed in detail above, that Defendant did not carry its burden on this front, and the CLIA common-interest agreement confers no attorney-client privilege protection. Defendant offers no other grounds for a finding that these remaining documents are privileged in light of Plaintiff's challenge, and thus I compel Defendant to produce those documents identified by Plaintiff as relating to lobbying and political strategy rather than legal advice.

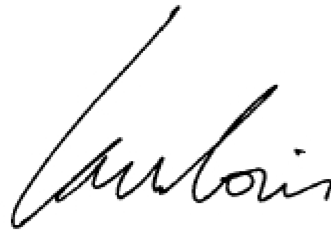
III. CONCLUSION

An award of attorney's fees is mandatory under Rule 37(a)(5) to the party who prevails on a motion to compel, unless the court finds the objections to the discovery substantially justified or other circumstances that would render such an award unjust. Because the undersigned finds that Defendant was not justified in withholding the COMAR documents, Plaintiff is entitled to an

award of its expenses, unless Defendant intends to show that its position was substantially justified or an award would be otherwise unjust.

Plaintiff shall serve upon Defendant's counsel documentation in support of its fees and costs reasonably incurred in the briefing of the COMAR issue. After conferral with Defendant's counsel regarding any objections to the fees and costs sought, if any dispute persists over Plaintiff's demand, Plaintiff shall file, by no later than **June 4, 2021**, a memorandum in support of its fees demand, indicating any agreement reached with Defendant's counsel and supported by documentation of the expenses sought. Defendant may respond within **14** days of Plaintiff's filing.

DONE AND ORDERED this 10th day of May, 2021 at Miami, Florida.



LAUREN FLEISCHER LOUIS
UNITED STATES MAGISTRATE JUDGE

cc: All Counsel of Record