**UNITED STATES DISTRICT COURT**
**SOUTHERN DISTRICT OF FLORIDA**

**Case No. 1:19-cv-23590-BLOOM/Louis**

HAVANA DOCKS CORPORATION,

Plaintiff,

v.

ROYAL CARIBBEAN CRUISES, 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. ECF No. 86. Plaintiff challenges Defendant's assertion of privilege over the following: (1) documents related to Defendant's knowledge of the Act and OFAC regulations, for which Plaintiff argues that Defendant waived privilege; (2) certain exchanges pertaining to contract negotiations between Defendant and the Cuban Government.[1] Defendant filed a Response, ECF No. 91, and Plaintiff further filed a Reply, ECF No. 92. Upon consideration of the Motion, Response, Reply, and being otherwise apprised in the matter, Plaintiff's Motion to Compel is DENIED in part and DENIED as withdrawn in part.

## I. BACKGROUND

### a. Factual and Procedural Background

Plaintiff alleges that Defendant trafficked in Plaintiff's interest in and certified claim to confiscated waterfront property in Havana, Cuba, and seeks damages under the Helms-Burton Act, 22 U.S.C. § 6021 *et seq*. Plaintiff owns a certified claim to a dock in Havana that Defendant allegedly used for the disembarking of passengers from its cruise ships that made port in Havana from approximately March

[1] The Court determined an *in camera* review of a sample of these documents was necessary, and as per the Court's Interim Order on the matter (ECF No. 100), Defendant submitted 20 relevant documents. Subsequently, the Parties resolved their dispute over this category of documents and have noticed withdraw of the Motion with respect to these exchanges. *See* ECF No. 101.

2017 through June 2019. Defendant contends that it is not liable to Plaintiff for use of the dock, because the Act carves out from the definition of "traffics" any "transactions and uses of property incident to lawful travel to Cuba, to the extent that such transactions and uses of property are necessary to the conduct of such travel." 22 U.S.C. § 6023(13)(B)(iii). Defendant contends the travel to Havana was pursuant to general licenses, thus lawful, and its use of Plaintiff's dock was "necessary" to conduct such travel. ECF No. 59 at 5. Among other challenges, Plaintiff contests the availability of the lawful travel and Due Process defenses to Defendant, and it 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 the claimed necessity of its use of Plaintiff's Subject Property.

**b. Plaintiff's Motion to Compel**

Plaintiff filed the instant Motion to Compel seeking documents withheld by Defendant under attorney-client privilege. ECF No. 86. Plaintiff argues that Defendant, by affirmatively arguing that it is not liable under the Act both because it relied on government actions and because it did not knowingly or intentionally traffic in the dock, put its state of mind at issue and thus waived attorney-client privilege. *Id*. at 6, 8.

## 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). The privilege is, however, an "obstacle to the investigation of the truth." *Cox v. Adm'r U.S. Steel & Carnegie*, 17 F.3d 1386, 1414 (11th Cir.) (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).[2]

[2] Plaintiff does not challenge that the documents fall within the ambit of attorney-client privilege; rather, it argues that Defendant subsequently waived that privilege, as discussed in further detail below.

**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 Fair Notice and Government Reliance Defense, ECF No. 86 at 6; and (2) Defendant's Lawful Intent Defense, *id.* at 8.

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). A party may *implicitly* rely 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 generally 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*.

Even so, a party may inject the question of its state of mind or subjective intent and yet still not waive privilege *if* it is able to move forward using objective evidence that the opponent may test, which negates the potential prejudice. *In re Namenda*, a case on which Plaintiff relies in its briefing, is particularly instructive on this point. 2017 WL 2226591. There, the defendant argued it had "not yet necessarily injected its subjective views" into the issues of the case, as it claimed it could support all

defenses and assertions made with objective evidence. *Id.* at *4 (emphasis in original). While the court agreed with the plaintiff that the issue being proven was typically at the crux of whether waiver was triggered, it acknowledged cases finding that "a litigant may sometimes use certain kinds of evidence and argument to show good faith, for example, without waiving privilege." *Id.* (citing cases). For example, *In re Namenda* cites *Holman v. Experian Information Solutions, Inc.*, No. C 11-180, 2012 WL 2501085, at *5 (N.D. Cal. June 27, 2012); the *Holman* court stated that

> [d]uring oral argument, Experian unequivocally stated to the court that it will not rely on an advice of counsel defense for any purpose in this case. Experian further represented that expert witness testimony would be confined to industry practices in the context of the ongoing [related] litigation, and would not be offered on the question of what Experian's lawyers did or what a reasonable lawyer would have done. Based on those representations, the court finds that Experian has not placed attorney advice at issue and that there is no implied waiver of the attorney-client privilege.

*In re Namenda Direct Purchaser Antitrust Litig*., 2017 WL 2226591, at *4 (quoting *Holman*, 2012 WL 2501085, at *5) (internal quotations omitted).

As a practical matter, a proponent who warrants that they will not rely on subjective evidence will likely be precluded from doing so at trial. *Arista* is particularly instructive of how this unfolds further along in the pretrial process, with the plaintiffs there filing a motion *in limine* to preclude defendants from introducing at trial arguments and testimony it previously denied plaintiffs access to, claiming they were privileged. 2011 WL 1642434 at * 2. 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; *see also* Order on Motion for Production or Preclusion at 3, *United Food & Commercial Workers Local 1776 & Participating Employers Health and Welfare Fund v. Teikoku Pharma USA, In*c., No. 14-md-2521 (N.D. Cal. Dec. 3, 2015) (permitting the defendants to maintain privilege "<u>only</u> if they continue to avoid reliance on their subjective beliefs, including expert testimony about their subjective beliefs, in proving their affirmative defenses . . . defense experts will not be able to opine about litigation uncertainty [or] . . . what they would have advised . . . regarding the status of the

litigation" (emphasis in original)). 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 "Fair Notice" and Government Reliance Defense*

Plaintiff avers that Defendant's claim that it did not have fair notice, as required by the Fifth Amendment's guarantee of Due Process, of liability under Title III and that it relied on actions by the federal government—in terms of the continuous and serial suspension of the Act—to conclude that no liability would attach to its actions necessarily implicates Defendant's subjective understanding of the law. ECF No. 86 at 6 (citing Defendant's Answer and Affirmative Defenses, ECF No. 59 at 9). Plaintiff claims this argument injects Defendant's understanding of the Act and OFAC regulations into the case, and the documents Defendant claims are protected by attorney-client privilege constitute key evidence that Plaintiff should be permitted to discover in order to determine whether Defendant *actually* relied on the Act's suspension in deciding to utilize the confiscated property. *Id.* at 8.

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 "persons of ordinary intelligence" would have had fair notice that his conduct violated the law. ECF No. 91 at 6-7 (quoting *High Ol' Times, Inc. v. Busbee*, 673 F. 2d 1225, 1229 (11th Cir. 1982)). As it applies to Defendant's argument, Defendant argues the inquiry here hinges on whether the government's continuous serial suspension of Title III would have given a theoretical person of ordinary intelligence fair notice that their conduct violated the law. *Id.* at 7 (citing *Anderson v. Crosby*, No. 5:04-cv-164, 2005 WL 3357220 (N.D. Fla. Mar. 25, 2005), which relied on the Eleventh Circuit's objective due process standard to find a regulation unconstitutionally vague, noting the petitioner's subjective belief was irrelevant). Defendant argues further that the applicability of this defense does not require the Court to examine Defendant's subjective weighing of the legality of its conduct, particularly given that Defendant does not claim it acted in good faith or based on the advice of its counsel. *Id*. at 8 (citing *In re Vann*, 67 F.3d 277, 280 (11th Cir. 1995)). The only

consideration before the Court, says Defendant, will be whether the government's statements, conduct, and inaction—all of which are publicly available—render Title III's activation unconstitutionally vague. *Id.* Defendant notes that Plaintiff has cited no case to support the proposition that a fair notice defense in and of itself waives privilege, and the cases relied upon by Plaintiff in its Motion involve affirmative defenses that all explicitly relied on either the litigant's good faith or subjective thinking, topics on which Defendant explicitly warrants it will not present evidence. *Id.* at 9-10. Defendant argues that *Plaintiff* is the only party attempting to inject questions of Defendant's subjective beliefs and should not be permitted discovery into these communications simply because they could be used to impeach Defendant's credibility. *Id*. at 10-11 (arguing that to hold otherwise would create a "credibility exception" to attorney-client privilege that would swallow the rule (citing *Centennial Bank v. ServisFirst Bank, Inc.*, No. 8:16-CV-88-T-36CPT, 2020 WL 1061450, at *3 (M.D. Fla. Mar. 4, 2020))).

In its Reply, Plaintiff attempts to parse out a specific "government reliance" retroactivity defense as separate from Defendant's Due Process argument, claiming that this defense is determined by a subjective standard. ECF No. 92 at 2-3. The "touchstone" of any reliance defense, claims Plaintiff, is evidence of a behavior change based on the representations of another, which necessarily requires contemplation of what the party understood the representations to mean and how they factored into the party's decision making. *Id.* at 4. Plaintiff argues that even if Defendant plans to use "publicly available evidence" of government representations, the intent is to give rise to the inference that Defendant "<u>actually, subjectively</u> relied" on the government's actions. *Id*. at 4 (emphasis in original).

The issues presented here are not a matter of first impression for this Court, having considered the parallel claims in the companion cases to this dispute. *See Havana Docks v. Norwegian Cruise Line*, Case No. 19-cv-23591, ECF No. 177, Order on Plaintiff's Motion to Compel. I find here, as I found there, that the Due Process inquiry 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. v. Busbee*, 673 F.2d 1225, 1229 (11th Cir. 1982)). 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, given the same set of facts. Defendant's belief, good faith or otherwise, as to whether it could be held liable under the Act, is not relevant on this point, and to hold otherwise would blur the line between Due Process considerations and a "defense of good faith." Further, I decline to consider Defendant's "government reliance" argument as separate and distinct from the Due Process analysis for the purposes of this Motion; as Defendant has characterized them, questions around government action are inherently part of the Due Process and fair notice considerations that do not raise the same concerns present in a retroactivity argument.

*2. Defendant's Lack of Intent Defense*

Characterizing it as a "state of mind defense," Plaintiff asserts that Defendant's claim that it did not knowingly and intentionally traffic in the dock is ultimately a restyled "defense of good faith." ECF No. 86 at 8 (citing ECF No. 59 at 9).

As noted above, this is one of several cases before the undersigned in which Plaintiff has presented this argument in an effort to argue that Defendant waived privilege by placing its state of mind at issue. Relying on the argument it presented in its motion to overcome the assertion of privilege by Defendant Norwegian Cruise Line,[3] Plaintiff draws a parallel, asserting that "[i]f [Defendant's] state of mind defense is like Norwegian's," and if Defendant intends to present evidence regarding its intentions and beliefs about the legality of its conduct, then Defendant necessarily waived privilege. *Id.* at 9-10. Plaintiff otherwise advances no evidence to support its argument that *this* Defendant intends to present evidence regarding its subjective beliefs or otherwise rely on them.

[3] *See Havana Docks v. Norwegian Cruise Line*, Case No. 19-cv-23591.

Defendant argues in response that this defense is a mere *denial* of willfulness, "not an affirmative defense at all," as noted in Plaintiff's Motion. ECF No. 91 at 11 (citing ECF No. 86 at 9 n. 7, which quotes *In re Rawson Food Serv., Inc*., 846 F.2d 1343, 1349 (11th Cir. 1988)). Defendant emphasizes the conditional nature of Plaintiff's arguments—that *if* Defendant's argument is like Norwegian's and *if* Defendant intends to present evidence about its subjective beliefs, then waiver has occurred. *Id.* at 12. Defendant, however, "expressly represents" that it will not present evidence of privileged communications to evidence its belief in the legality of its actions. *Id.* at 12. Defendant argues that its "mere denial" has no bearing on its good faith or whether it believed that its actions were lawful, which cannot impliedly waive attorney-client privilege. *Id*. (citing *Cox*, 17 F.3d at 1419; *Centennial*, 2020 WL 1061450, at *5; *Blake*, 2017 WL 10059251, at *15).

While the attorney-client privilege protects disclosures made in confidence by a client to her attorney for the purpose of securing legal advice, this privilege belongs to the client, who may elect to waive it "either expressly or by implication." *Knox v. Roper Pump Co.*, 957 F.3d 1237, 1248 (11th Cir. 2020) (citing *Cox*, 17 F.3d at 1417). The principle underpinning this doctrine of waiver by implication is, as noted above, 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[ed] 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. The question of affirmative assertion is key, given that the inquiry here is whether Defendant is using the question of its legality, and what it believed about its legality, as a sword or a shield.

The Parties will likely recognize this analysis from my Order on Plaintiff's analogous motion to compel in *Havana Docks Corporation v. Norwegian Cruise Line Holdings, Limited*, Case No. 19-cv-23591, ECF No. 177, in which I relied in part on my prior analysis in *Siegmund*. There, the statute in question included a "good faith" component, and the defendants asserted compliance with the statute. *Siegmund*, 2018 WL 3725775, at *12. 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), where 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 implicitly 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 assert that it did *not* act knowingly and intentionally, as this would simply be an averment that Defendant complied with the law; the mere fact that the statute introduces a state of mind component does not inherently place Defendant's subjective beliefs at issue. Plaintiff's reliance on the Defendant's "lack of intent" defense in its Answer illustrates this point: Defendant's Answer states that Plaintiff's claim is barred because Defendant "did not knowingly and intentionally traffic in the Subject Property." *See* ECF No. 59 at 9. This is purely a denial of the willfulness element inherent to Plaintiff's prima facie case based on the plain language of the Act and insufficient to place Defendant's state of mind at issue for purpose of finding waiver of the attorney-client privilege, particularly as Defendant here warrants that it will not present evidence to a fact finder of its subjective intentions and beliefs. The fact that Plaintiff might find it useful to pursue a factual inquiry into what Defendant believed or did not believe is beside the point. *See Knox*, 957 F.3d at 1249 ("The fact that the communications might be helpful to [plaintiff's] claim does not in itself waive the privilege."). I therefore find that Defendant did not waive privilege on this basis.

## III. CONCLUSION

For the foregoing reasons, Plaintiff's Motion, to the extent it has not been withdrawn by agreement of the Parties, is otherwise **DENIED**.

**DONE AND ORDERED** this 12th day of July, 2021 at Miami, Florida.

LAUREN FLEISCHER LOUIS
UNITED STATES MAGISTRATE JUDGE

cc: All Counsel of Record