

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE**

INVISTA NORTH AMERICA S.À.R.L.,)
and AURIGA POLYMERS INC.,)
Plaintiffs)

v.)

Civil Action No. 11-1007-SLR-CJB

M&G USA CORPORATION and)
M&G POLYMERS USA, LLC,)
Defendants.)

MEMORANDUM ORDER

Pending before the Court in this patent infringement action is Defendants M&G Corporation and M&G Polymers USA, LLC's (collectively, "M&G" or "Defendants") motion to compel the production of [REDACTED] that Plaintiff INVISTA North America S.à.r.l. ("INVISTA") claims is privileged, and for additional discovery relating to [REDACTED] (the "motion to compel"). (D.I. 179) For the reasons discussed below, the Court DENIES M&G's motion.

I. BACKGROUND

A. [REDACTED]

INVISTA and M&G (as well as their respective corporate affiliates and related entities) are currently engaged in intellectual property litigation on various fronts around the world. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

2

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] INVISTA relied upon [REDACTED] [REDACTED] during oral argument on the motion to compel, and provided M&G with a

[REDACTED]

[REDACTED]

copy at the conclusion of the hearing. (D.I. 223 at 1-2) [REDACTED]

[REDACTED]

C. INVISTA’s Inadvertent Disclosure of [REDACTED] to M&G

On June 11, 2012, the Court entered a Protective Order in this case that, *inter alia*, sets out a procedure to be followed in the event of inadvertent disclosure of allegedly privileged or work product-protected documents (the “claw-back provision”). (D.I. 63 at ¶ 9) The claw-back provision provides that, *inter alia*, “inadvertent production in discovery . . . shall not be deemed a waiver or impairment of any claim of privilege or protection, including but not limited to the attorney client privilege, the protection afforded to work product materials or the subject matter thereof, or the confidential nature of any such information.” (*Id.*)

While preparing documents to be produced in discovery in this case, INVISTA’s outside counsel used privilege screens to tag documents believed to be privileged. (D.I. 199 at 6) INVISTA’s counsel used an e-discovery software program known as Relativity to handle the document collection and production. (D.I. 200 at ¶ 3) Relativity is equipped with a “propagation” feature that automatically tags all attachments to a document (such as an e-mail)

that has been tagged as privileged. (*Id.* at ¶ 4) However, the attorneys who ran the privilege screens for INVISTA's September 7, 2012 document production inadvertently did so while Relativity's propagation feature was turned off. (*Id.*) For this reason, while documents were tagged as privileged, any attachments to those documents were not similarly tagged. (*Id.*) [REDACTED] was one such attachment that was not tagged as privileged. (*Id.* at ¶ 5) Therefore, INVISTA inadvertently produced four copies of [REDACTED] to M&G as part of its September 7, 2012 document production. (*Id.*)

On or about January 17, 2013, during a document review, M&G discovered [REDACTED] (D.I. 180 at 4) The next day, Friday, January 18, 2013, M&G's counsel notified INVISTA's counsel that it may have inadvertently produced [REDACTED] (*Id.*; D.I. 201, ex. H) On Saturday, January 19, 2013, INVISTA's counsel notified M&G's counsel that it had indeed unintentionally produced [REDACTED], requested that M&G comply with the claw-back provision of the Protective Order by destroying the copies of [REDACTED], and served a corresponding privilege log identifying these documents as ones that should have been withheld subject to INVISTA's claims of attorney-client privilege and work product protection. (D.I. 201, ex. I)

M&G filed a motion to compel production of [REDACTED] on January 28, 2013. (D.I. 179) The motion was fully briefed as of February 19, 2013, (D.I. 205), and on February 27, 2013, the Court heard oral argument regarding the motion, (D.I. 239; D.I. 240 (hereinafter, "Tr.")). Subsequently, on March 1, 2013 and March 4, 2013 respectively, the parties filed supplemental letter briefs regarding the motion. (D.I. 223; D.I. 227)

II. STANDARD OF REVIEW

Federal Rule of Civil Procedure 37 applies to motions to compel discovery, providing

that “[o]n notice to other parties and all affected persons, a party may move for an order compelling . . . discovery.” Fed. R. Civ. P. 37(a)(1). Under Federal Rule of Civil Procedure 26(b)(1), “[p]arties may obtain discovery regarding any nonprivileged matter that is relevant to any party’s claim or defense.” While it is well-settled that the Federal Rules permit broad discovery, a party’s right to discovery is not without limits. *Bayer AG v. Betachem, Inc.*, 173 F.3d 188, 191 (3d Cir. 1999). One such limit is that courts may not order the production of discovery that is protected by an evidentiary privilege. *See, e.g., Pearson v. Miller*, 211 F.3d 57, 65 (3d Cir. 2000).

The attorney-client privilege bestows upon the client the “right to refuse to disclose confidential communications between attorney and client made for the purpose of obtaining legal advice.” *Hoffmann-La Roche, Inc. v. Roxane Labs., Inc.*, Civil Action No. 09-6335 (WJM), 2011 WL 1792791, at *4 (D.N.J. May 11, 2011) (internal quotations marks and citation omitted). In protecting these communications, the privilege “encourage[s] full and frank” information exchanges within the attorney-client relationship, in order to promote the observation of law and the administration of justice. *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981); *Westinghouse Elec. Corp. v. Republic of Philippines*, 951 F.2d 1414, 1423 (3d Cir. 1991). The work product doctrine, for its part, protects “papers prepared by or on behalf of attorneys in anticipation of litigation.” *Westinghouse*, 951 F.2d at 1428; *accord WebXchange Inc. v. Dell Inc.*, 264 F.R.D. 123, 128 (D. Del. 2010) (citation omitted); Fed. R. Civ. P. 26(b)(3). Other relevant law regarding these privileges is further discussed below.

III. DISCUSSION

M&G argues that ██████████ must be disclosed for two primary reasons. First, M&G

contends that any privilege attached to ██████████ is pierced by the crime-fraud exception, as the ██████████ (D.I. 180 at 2)³ Second, M&G asserts that any privilege in ██████████ has been waived by INVISTA pursuant to its inadvertent disclosure of the document (and INVISTA's failure to take reasonable measures to promptly rectify the error). (*Id.* at 13-14) The Court will address these arguments in turn.

A. The Crime-Fraud Exception

The protections afforded by the attorney-client privilege and work product doctrine “are not absolute.” *In re Grand Jury*, 705 F.3d 133, 151 (3d Cir. 2012). The crime-fraud exception is one such limit on the scope of the protections afforded by these doctrines. *Id.* The purpose of the crime-fraud exception is “to assure that the seal of secrecy between lawyer and client does not extend to communications made for the purpose of getting advice for the commission of a fraud or crime.” *United States v. Zolin*, 491 U.S. 554, 563 (1989) (internal quotation marks and citation omitted).

The United States Court of Appeals for the Third Circuit has held that to pierce the attorney-client privilege or work product doctrine using the crime-fraud exception, the party seeking to overcome the privilege “must make a prima facie showing that (1) the client was committing or intending to commit a fraud or crime, and (2) the attorney-client communications were in furtherance of that alleged crime or fraud.” *In re Grand Jury*, 705 F.3d at 151 (internal

³ M&G does not contest that, if its arguments regarding the applicability of the crime-fraud exception and waiver are unsuccessful, ██████████ is otherwise protected by the attorney-client privilege and work product doctrine.

quotation marks and citation omitted).⁴ The United States Supreme Court established this standard in *Clark v. United States*, 289 U.S. 1 (1933), where it noted that, for the exception to “drive the privilege away, there must be something to give colour to the charge; there must be prima facie evidence that it has some foundation in fact.” *Clark*, 289 U.S. at 15 (internal quotation marks and citation omitted). In other words, “[w]here there is a reasonable basis to suspect that the privilege holder was committing or intending to commit a crime or fraud and that the attorney-client communications or attorney work product were used in furtherance of the alleged crime or fraud, this is enough to break the privilege.” *In re Grand Jury*, 705 F.3d at 153. This standard “is intended to be reasonably demanding; neither speculation nor evidence that shows only a distant likelihood of corruption is enough.” *Id.* (internal quotation marks and citation omitted). On the other hand, “the party opposing the privilege is not required to introduce evidence sufficient to support a verdict of crime or fraud or even to show that it is more likely than not that the crime or fraud occurred.” *Id.* (citations omitted).⁵

⁴ This patent infringement action arises under federal law, with the Court’s jurisdiction based on 28 U.S.C. § 1331 and 28 U.S.C. § 1338. (D.I. 7 at ¶ 5) Accordingly, federal common law applies here to questions of privilege. Fed. R. Evid. 501; *see also Pearson*, 211 F.3d at 66. In patent cases, regional circuit law governs privilege-related disputes, like this one, that are not unique to patent law. During oral argument, both parties agreed that Third Circuit law governs this dispute. (Tr. at 18, 33-34)

⁵ In *In re Grand Jury*, the Third Circuit emphasized that this reasonable basis standard was particularly appropriate in the grand jury context. *Id.* at 154. While pointing out that at least one other circuit has held that the preliminary factual determinations necessary to apply the crime-fraud exception should meet a higher standard in the civil litigation context than in the grand jury context, the Third Circuit stated “no view as to whether a higher standard should be applied in the civil litigation context.” *Id.* at 155 n.20. In this case, the Court will utilize the “reasonable basis” standard in its analysis, as its ultimate decision would be no different were a higher standard utilized.

1. Whether There Is a Reasonable Basis to Suspect that INVISTA Committed, or Intended to Commit, the Crimes at Issue

The relevant inquiry here is whether there is a reasonable basis to suspect that INVISTA committed, or had the requisite intent to commit, the referenced crimes. *See In re Grand Jury Investigation*, 445 F.3d 266, 279 & n.4 (3d Cir. 2006) (stating that while there was no indication that the attorney acted improperly or was aware of wrongdoing, “the crime-fraud exception applies even when an attorney is unaware that the client is engaged in or planning a crime”); *United States v. Doe*, 429 F.3d 450, 454 (3d Cir. 2005) (stating that in the crime-fraud exception analysis, “the client’s intention controls and the privilege may be denied even if the lawyer is altogether innocent”) (internal quotation marks and citation omitted). INVISTA argues that M&G cannot meet its burden to make that showing, [REDACTED]

[REDACTED] (D.I. 199 at 11-12) [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

M&G’s argument to the contrary is that the crime-fraud exception applies here because “there is prima facie evidence to believe [REDACTED] Invista, engaged in unlawful or improper conduct.” (D.I. 205 at 1) In analyzing the elements of the crime-fraud exception, M&G’s briefing focuses largely, if not exclusively, [REDACTED] (*see* D.I. 180), and in summarizing the issue at oral argument, M&G’s counsel stated that [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

A sufficient showing that [REDACTED] was committing or intending to commit a crime as INVISTA's agent *could* satisfy the first prong of the crime-fraud exception. *See In re Katrina Canal Breaches Consol. Litig.*, Civil Action No. 05-4182, 2008 WL 4401970, at *13 (E.D. La. Sept. 22, 2008) (rejecting argument that crime fraud exception was inapplicable because even if hired investigators committed a crime, plaintiff failed to show that the privilege holder itself did so, as the privilege holder "at least ratified its agents' actions"). As explained below, however, even if [REDACTED] could be said to have been acting as INVISTA's agent for purposes of the conduct discussed herein, the Court is not persuaded that M&G has made out a *prima facie* case that [REDACTED] was engaging in the criminal conduct asserted.⁶

⁶ Even if it were possible for these facts to provide the Court with a reasonable basis to suspect that [REDACTED] committed, or intended to commit, any of the accused crimes discussed below, the Court would find that there is insufficient evidence to conclude that [REDACTED] was acting as INVISTA's agent in doing so. [REDACTED]

[REDACTED] To the extent that [REDACTED] nevertheless acted unlawfully, then, there is insufficient evidence that it did so at INVISTA's direction. Thus, [REDACTED] would not qualify as INVISTA's agent in this regard, making the crime-fraud exception inapplicable. *See Garrett v. Metro. Life Ins. Co.*, No. 95 CIV. 2406 (PKL), 1996 WL 325725, at *3 (S.D.N.Y. June 12, 1996) (stating that, to qualify as attorney's agent, the party must work under the attorney's direction and control, and concluding that a third party research company acted as attorney's agent where it compiled reports under attorney's control *and pursuant to the directions that it received*); *see also In re Katrina*, 2008 WL 4401970, at *13 (rejecting argument that crime-fraud exception was inapplicable because plaintiffs failed to show that the client itself (as opposed to the client's investigators) committed any crimes, noting that "it is the client's purpose which is controlling" and finding there that if the client "did not direct [the wrongful conduct] when [it] occurred [], it has at least ratified its agents' actions in doing so") (internal quotation marks and citations omitted). Here, there is not sufficient evidence that INVISTA directed [REDACTED] to break the law [REDACTED], nor that it could be said to have later ratified conduct that appeared to be illegal. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] M&G alleges that [REDACTED] conduct provides a reasonable basis to believe that it (and thus, INVISTA) committed four crimes; it also argues that this conduct may have occasioned a violation of certain Rules of Professional Conduct. (*See* D.I. 180) The Court will address each allegation in turn.

a. Computer Fraud and Abuse Act, 18 U.S.C. § 1030

At oral argument, M&G asserted that of the criminal and ethical violations it claims are implicated by [REDACTED] conduct, its strongest arguments are with respect to the Consumer Fraud and Abuse Act (“CFAA”) and the Stored Communications Act. (Tr. at 14-15) The CFAA makes it a crime to, *inter alia*, “intentionally access[] a computer without authorization or exceed[] authorized access” to obtain “information from a protected computer.” 18 U.S.C. § 1030(a)(2).⁷ M&G focuses its argument regarding [REDACTED] purported violation of the CFAA on the notion that

[REDACTED]

[REDACTED]

violated the CFAA [REDACTED] without authorization. (D.I. 180 at 6; D.I. 205 at 4; *see also id.* at 3 [REDACTED])

[REDACTED]

⁷ M&G does not specifically say so, but the language used in its opening brief suggests that its focus as to the CFAA is on an alleged violation of Section 1030(a)(2). (D.I. 180 at 6 (noting that CFAA criminalizes “accessing a computer without authorization” or “exceeding authorized access to obtain information from a protected computer”))

However, the current state of the record does not provide a reasonable basis to believe that [REDACTED] in [REDACTED] was obtained via unauthorized access [REDACTED]

[REDACTED] Instead, as events appear to have now made clear to both parties (and to the Court), [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] At oral argument, M&G's counsel appeared to concede that

[REDACTED]

[REDACTED]—would not amount to the type of unauthorized access of a computer prohibited by the

CFAA. (Tr. at 9-10) The additional letter brief that M&G submitted to the Court after oral

argument, relating to [REDACTED], did not further argue that these

circumstances suggested a violation of the CFAA (instead, it argued that [REDACTED]

[REDACTED] supported a conclusion that [REDACTED] were guilty of ethical violations).

(See D.I. 223); cf. *Pulte Homes, Inc. v. Laborers' Int'l Union of N.A.*, 648 F.3d 295, 304 (6th Cir.

2011) (finding that e-mail to user of an e-mail system open to the public, such as one that did not

require the entering of a code or password in order to send an e-mail to a recipient, did not

amount to accessing a computer “without authorization” pursuant to the CFAA).

This state of affairs jibes with [REDACTED]

[REDACTED]

[REDACTED] Given the emphasis in [REDACTED] on [REDACTED] and the additional information developed through the briefing, at oral argument and afterwards as to how [REDACTED]

[REDACTED] As a result, there is not a reasonable basis to suspect that [REDACTED] (or INVISTA) violated, or intended to violate, the CFAA.

b. Stored Communications Act, 18 U.S.C. § 2701

The Stored Communications Act makes it a crime to “intentionally access[] without authorization a facility through which an electronic communication service is provided,” thereby

8

[REDACTED]

“obtain[ing] . . . [an] electronic communication while it is in electronic storage.” 18 U.S.C. § 2701(a)(1). M&G argued that “ [REDACTED] also likely violated the Stored Communications Act,” but noted that, [REDACTED]

[REDACTED]

(D.I. 180 at 7) In essence, M&G’s argument regarding a suspected violation of the Stored Communication Act was premised on the same argument as that put forward regarding the CFAA—that [REDACTED]

[REDACTED] (*Id.* at 7-8)

As explained above, the record before the Court now does not provide a sufficient basis to believe that [REDACTED] engaged in this conduct. Therefore, the Court cannot find a reasonable basis to suspect that it (or INVISTA) violated, or intended to violate, the Stored Communications Act.

c. Travel Act, 18 U.S.C. § 1952

While M&G’s arguments regarding the first two criminal statutes listed above focused on [REDACTED] its arguments concerning the Travel Act and Economic Espionage Act relate to [REDACTED]

[REDACTED] The Travel Act prohibits, among other things, commercial bribery in violation of state law.⁹ 18 U.S.C. § 1952. M&G claims that [REDACTED] provides “ample evidence” of a scheme whereby [REDACTED]

⁹ [REDACTED] (D.I. 180 at 9 n.4) M&G references Illinois law, which prohibits commercial bribery, committed when one confers a benefit “upon any employee, agent or fiduciary without the consent of the latter’s employer . . . with the intent to influence his conduct in relation to his employer’s . . . affairs.” 720 Ill. Comp. Stat. 5/29A-1. It cites also to Delaware law, which similarly prohibits commercial bribery and defines it similarly. Del. Code Ann. tit. 11, § 881(1).

[REDACTED]

[REDACTED]

For more specific support for its claim, M&G cites to self-defined “classic ‘red flags’” that supposedly indicate that [REDACTED] was engaged in bribery. (*Id.* at 9) [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

Here, the Court agrees with INVISTA that M&G has failed to establish a sufficient foundation in fact for its bribery theory. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

Lastly, as to the lack of information in the record as to what due diligence, if any, [REDACTED] performed [REDACTED] here the absence of evidence cannot be evidence—it is M&G’s burden to show that the crime/fraud exception applies, not INVISTA’s burden to show it does not. In the end, M&G’s arguments would require the Court to engage in speculation, or give too much weight to “evidence that shows only a distant likelihood of corruption,” if it were

to find a reasonable basis to suspect [REDACTED] of committing, or intending to commit, commercial bribery based on these factors. *In re Grand Jury*, 705 F.3d at 153.

Furthermore, as INVISTA points out, (D.I. 199 at 15), M&G has presented no real evidence that [REDACTED]

[REDACTED]

[REDACTED] The possibilities could be further stacked up. However, to make the leap necessary to implicate the commercial bribery statutes, without any concrete indication of [REDACTED] would be to credit the sort of speculation that cannot justify the application of the crime-fraud exception. *See Aiossa v. Bank of Am., N.A.*, No. CV 10-01275 (JS)(ETB), 2011 WL 4026902, at *7-8 (E.D.N.Y. Sept. 12, 2011) (declining to apply crime-fraud exception to protect documents where plaintiff's arguments in support of the exception were speculative, "undermined by other evidence and . . .

susceptible of innocent explanations”); *S. Scrap Material Co. v. Fleming*, No. Civ. A. 01-2554, 2003 WL 21474516, at *8 (E.D. La. June 18, 2003) (“Bare *allegations* will not supply the prima facie predicate necessary to invoke the crime-fraud exception.”).

d. Economic Espionage Act, 18 U.S.C. § 1832

M&G also asserts that there is “probable cause to believe that [REDACTED] conduct violated the Economic Espionage Act.” (D.I. 180 at 10) The Economic Espionage Act prohibits the theft of trade secrets. 18 U.S.C. § 1832. In this portion of its briefing, the only specific conduct that M&G highlights in support of this charge is [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

The Court, however, is unpersuaded that this evidence establishes a reasonable basis to suspect [REDACTED] of violating, or intending to violate, the Economic Espionage Act. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] Moreover, in its briefing, INVISTA points to documents indicating that M&G has publicly provided customer names [REDACTED] [REDACTED] at conferences and to potential clients. (D.I. 199 at 5, 14) M&G, in its reply brief, does not directly respond to this particular argument. (D.I. 205 at 5)

On these facts, then, there is simply not enough for the Court to formulate a reasonable basis to suspect [REDACTED] (and INVISTA) of committing, or intending to commit, the theft of M&G's trade secrets.

e. Model Rules of Professional Conduct

Courts have held that, at least in some circumstances, the protection afforded by the work product doctrine may be vitiated when an attorney violates professional standards of conduct. *Moody v. IRS*, 654 F.2d 795, 800 (D.C. Cir. 1981); *Anderson v. Hale*, 202 F.R.D. 548, 558 (N.D. Ill. 2001); *Ward v. Maritz Inc.*, 156 F.R.D. 592, 594 (D.N.J. 1994). In its briefing, M&G asserted that [REDACTED] may have implicated violations of various Rules of Professional

2. Whether [REDACTED] Was In Furtherance of a Crime

Even if M&G could establish a *prima facie* case that INVISTA was committing or intending commit a crime, it cannot sufficiently establish the second prong of the crime-fraud exception—that [REDACTED] was in furtherance of the alleged crime. *In re Grand Jury*, 705 F.3d at 151. Significantly, the “crime-fraud exception only applies to communications which occur before or during the crime, not communications made after the fact.” *Magnetar Techs. Corp. v. Six Flags Theme Park Inc.*, 886 F. Supp. 2d 466, 488 (D. Del. 2012) (citation omitted); *see also Chester Cnty. Hosp. v. Independence Blue Cross*, No. Civ. A. 02-2746, 2003 WL 25905471, at *6 (E.D. Pa. Nov. 10, 2003).

Here, M&G alleges that there is a reasonable basis to believe that [REDACTED] broke various laws [REDACTED] Even if that were true, the conduct described therein would amount to past, completed activity that would not fall within the ambit of the crime-fraud exception. *See Magnetar*, 886 F. Supp. 2d at 488; *Chester Cnty. Hosp.*, 2003 WL 25905471, at *6; *see also NXIVM Corp. v. O’Hara*, 241 F.R.D. 109, 133-34 (N.D.N.Y. 2007) (rejecting application of crime-fraud exception to investigative report that summarized two improper, and likely illegal, investigative acts, as “the exception concerns not prior wrong doing but future wrong doing”) (internal quotation marks and citations omitted). [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

INVISTA did not catch the error in the four and a half months that elapsed after [REDACTED] production, M&G argues that INVISTA failed to promptly address the problem. (D.I. 180 at 13)

However, INVISTA clawed back [REDACTED] each page of which had been marked “PRIVILEGED AND CONFIDENTIAL—ATTORNEY WORK PRODUCT[,]” on a Saturday, less than twenty-four hours after M&G notified INVISTA’s counsel that [REDACTED] may have been inadvertently produced. (D.I. 199 at 5, 7); *see, e.g., Zapmedia Servs., Inc. v. Apple Inc.*, No. 2:08-CV-104-DF-CE, 2010 WL 5140672, at *1-2 (E.D. Tex. Sept. 24, 2010) (finding privilege holder’s immediate request to claw back arguably privileged documents after being made aware of their existence and privileged status supported finding that privilege holder had acted promptly and reasonably to rectify any error under Rule 502(b)). The Court is not persuaded that INVISTA otherwise came up short pursuant to its obligations under Rule 502(b)(3), especially with respect to a document production on the scale at issue here. More specifically, the Court is not convinced that INVISTA’s prior inadvertent production of a small number of other, unrelated documents—documents that were inadvertently produced for reasons *different* from the Relativity software error that led to [REDACTED] inadvertent production—should reasonably have caused INVISTA to have: (1) scoured every document it had otherwise produced; (2) earlier determined that [REDACTED] had also been inadvertently produced; and (3) taken steps to rectify this.¹² *See* Fed. R. Evid. 502 Advisory Comm. Notes (stating that Rule 502(b) “does not require the producing party to engage in a post-production review to determine whether any protected

¹² Although the burden under Rule 502(b)(3) to “promptly” take reasonable steps to rectify any error was INVISTA’s, it is worth noting that, in light of the scope of the document productions in this case, it took M&G four and a half months after [REDACTED] production to even determine that it had [REDACTED] in its possession. (Tr. at 4-5)

communication [] has been produced by mistake, but rather only that the “producing party [must] follow up on any obvious indications that a protected communication . . . has been produced inadvertently”); (Tr. at 38). Nor has M&G pointed the Court to any case law in support of such a conclusion.

C. Conclusion

It does not appear to be in serious dispute that, absent an applicable exception, [REDACTED] is privileged. (See D.I. 205 at 1; see also *NXIVM Corp. v. O’Hara*, 241 F.R.D. at 133

[REDACTED]

Because the Court finds each of M&G’s arguments in support of disclosure of [REDACTED] to be without sufficient merit, the Court denies M&G’s motion to compel disclosure of [REDACTED]. Accordingly, the Court also denies M&G’s request for further discovery regarding [REDACTED] [REDACTED], as well as its request that the Court require INVISTA to modify the confidentiality designation on [REDACTED] from “Attorneys’ Eyes Only” to “Confidential.” (D.I. 180 at 14-15; D.I. 205 at 9-10)

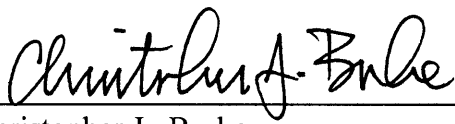
IV. CONCLUSION

For the reasons outlined above, it is hereby ORDERED that M&G’s motion to compel is DENIED.

Because this Memorandum Order may contain confidential information, it has been released under seal, pending review by the parties to allow them to submit a single, jointly proposed, redacted version of the Memorandum Order. Any such redacted version shall be submitted no later than **August 7, 2013** for review by the Court, and should be in accordance with the Court’s forthcoming Order regarding the scope of permissible redactions to

the document. The Court will subsequently issue a publicly-available version of its
Memorandum Order.

Dated: July 15, 2013



Christopher J. Burke
UNITED STATES MAGISTRATE JUDGE