

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

CITRIX SYSTEMS, INC.,)	
)	
Plaintiff,)	
)	
v.)	Civil Action No. 18-588-LPS
)	
WORKSPOT, INC.,)	
)	
Defendant.)	

MEMORANDUM ORDER

At Wilmington this **20th** day of **November, 2019**, the court having considered Citrix Systems, Inc.'s ("Citrix") motion to compel the production of TRO-related communications with Gibson Dunn from October 15, 2018 to January 28, 2019 and Workspot, Inc.'s ("Workspot") response to Citrix's motion (D.I. 284; D.I. 285); IT IS HEREBY ORDERED THAT Citrix's motion to compel is DENIED for the reasons set forth below.

1. Background. On April 19, 2018, Citrix Systems Inc. ("Citrix") initiated the present litigation by filing a complaint against Workspot, Inc. ("Workspot"), alleging causes of action for patent infringement, false advertising under Section 43(a) of the Lanham Act, violations of the Delaware Deceptive Trade Practices Act, and unfair competition. (D.I. 1 at ¶¶ 43-129)

2. In early October 2018, Workspot's Chief Technology Officer, Puneet Chawla, sent emails and posted information to websites to harass, intimidate, and extort Citrix and two of its executives. (D.I. 262, Exs. 1, 3-12) After investigating the source of the threatening emails, Citrix notified Workspot on October 15, 2018 that Mr. Chawla sent the communications. (D.I. 262, Ex. 13)

3. On October 16, 2018, Citrix filed a motion for a temporary restraining order (“TRO”) against Workspot. (D.I. 101) Workspot responded to Citrix’s motion for a TRO on October 30, 2018, claiming that Citrix’s allegations against Mr. Chawla were speculative and unsupported by competent evidence. (D.I. 112 at 1, 19-20; 12/12/18 Tr. at 16:7-15) In conjunction with Workspot’s response, Mr. Chawla filed a declaration, under penalty of perjury, categorically denying that he sent the threatening emails and web postings. (D.I. 115 at ¶¶ 2-4)

4. On December 12, 2018, the District Judge conducted a hearing on the motion for a preliminary injunction and the TRO motion. (12/12/18 Tr.) The District Judge denied Citrix’s motion for a TRO, but he expressed concerns about the allegedly false declaration signed by Mr. Chawla on October 30, 2018 and ordered discovery on the issue. (12/12/18 Tr. at 4:25-5:18, 110:5-17) The District Judge also ordered Workspot to reimburse Citrix for half of the costs incurred in connection with the TRO motion. (*Id.* at 111:18-23)

5. By February 2019, Workspot terminated its lead counsel, Gibson Dunn, and retained the law firm of Nixon Peabody to represent it going forward. (D.I. 172, Ex. 1 at 66; D.I. 177)

6. Citrix subsequently challenged the sufficiency of Workspot’s investigative efforts and discovery responses regarding the Chawla declaration. (D.I. 185; D.I. 188) On March 28, 2019, the undersigned judicial officer issued a Memorandum Order granting-in-part Citrix’s motion to compel the production of certain privileged communications pursuant to the crime-fraud exception to the attorney-client privilege. (D.I. 197)

7. On August 28, 2019, Citrix filed a motion for sanctions against Workspot, alleging spoliation of evidence and obstruction of Citrix’s investigation into Mr. Chawla’s conduct by Workspot’s counsel. (D.I. 260; D.I. 261) According to Citrix, Workspot relied on an

advice of counsel defense in response to Citrix's motion for sanctions, thereby waiving the attorney-client privilege as to various communications exchanged between October 15, 2018 and January 28, 2019, when Workspot replaced Gibson Dunn as its counsel. (D.I. 284) Citrix now seeks to compel production of the privileged communications as a result of the alleged waiver. (*Id.*)

8. Citrix urges the court to find a broad subject matter waiver concerning legal advice Workspot received from its former counsel, Gibson Dunn, with regard to investigating certain unlawful and egregious communications and social media posts to Citrix and opposing Citrix's motion for a temporary restraining order. Therefore, the court considers whether Workspot has consciously injected privileged communications beyond the previously-ordered production to avoid sanctions and shift blame to its former counsel.

9. **Legal standard.** The attorney-client privilege protects communications between a client and an attorney related to the purpose of securing legal advice. *See Rhone-Poulenc Rorer Inc. v. Home Indem. Co.*, 32 F.3d 851, 862 (3d Cir. 1994). "[A] party can waive the attorney client privilege by asserting claims or defenses that put his or her attorney's advice in issue in the litigation," such as by asserting reliance on the advice of counsel as an affirmative defense and disclosing attorney-client communications. *Id.* at 863; *see also Bowman v. Am. Homecare Supply, LLC*, 2009 WL 1873667, at *3 (E.D. Pa. June 25, 2009). Waiver occurs only if the client makes a conscious decision and takes affirmative steps to disclose or describe privileged communications to prove a claim or defense. *Id.*; *Glenmede Trust Co. v. Thompson*, 56 F.3d 476, 486 (3d Cir. 1995). The relevance of the privileged communications is immaterial to the waiver analysis, even if the communications "are vital, highly probative, directly relevant or even go to the heart of an issue." *Rhone-Poulenc*, 32 F.3d at 864.

10. The party asserting reliance on advice of counsel should not be permitted to selectively define the parameters of the waiver of the attorney-client privilege as to that advice because “[t]o do so would undermine the very purpose behind the exception to the attorney-client privilege at issue here—fairness.” *Glenmede*, 56 F.3d at 486. “The party opposing the defense of reliance on advice of counsel must be able to test what information had been conveyed by the client to counsel and vice-versa regarding that advice—whether counsel was provided with all material facts in rendering their advice, whether counsel gave a well-informed opinion and whether that advice was heeded by the client.” *Id.*

11. **Analysis.** Citrix’s motion to compel is denied. Workspot’s actions do not amount to a subject matter waiver of the attorney-client privilege because Workspot did not consciously inject privileged information into the litigation. *See Glenmede*, 56 F.3d at 486 (holding that a client who asserts reliance on the advice of counsel as an affirmative defense may waive the privilege by making “a conscious decision to inject the advice of counsel as an issue in the litigation.”).

12. Citrix supports its allegations of Workspot’s misconduct by citing privileged communications produced pursuant to the court’s March 28, 2019 Memorandum Order, which applied the crime-fraud and third-party disclosure exceptions to the attorney-client privilege. (D.I. 284, Ex. 2) In its answering brief, Workspot contends that it relied on the advice of Gibson Dunn pursuant to the same privileged communications cited by Citrix. (D.I. 284, Ex. 1) Workspot did not voluntarily disclose these privileged communications because it was compelled to produce them pursuant to the court’s March 28, 2019 Memorandum Order. *See Hynix Semiconductor Inc. v. Rambus Inc.*, 2008 WL 350641, at *1 (N.D. Cal. Feb. 2, 2008) (“In general, a disclosure compelled by a court order . . . does not waive the attorney-client and work

product privileges.”); *Leonen v. Johns-Manville*, 135 F.R.D. 94, 99 (D.N.J. 1990) (finding disclosure of discovery was involuntary because the defendant objected and only produced documents pursuant to a court order). There is no indication that Workspot injected previously-undisclosed privileged communications into the litigation in its efforts to defend itself against the motion for sanctions brought by Citrix. (D.I. 284, Ex. 1)

13. Citrix argues that the Sinha declaration¹ filed by Workspot amounts to a subject matter waiver of the attorney-client privilege. (D.I. 284 at 2-3) In bullet points, Citrix lists specific arguments from Workspot’s briefing that allegedly raise reliance on advice of counsel to oppose Citrix’s motion for sanctions. (*Id.*) Citrix points to Workspot’s reliance on counsel’s advice as it pertains to: (1) the deletion of a social media post by Mr. Chawla; (2) the extent of the investigation into Citrix’s allegations of Mr. Chawla’s unlawful conduct; (3) the alleged spoliation of evidence on Mr. Chawla’s personal devices; (4) the decision to file the Chawla declaration containing misleading information; (5) the decision not to seek an extension to file Workspot’s TRO answering brief; (6) Mr. Sinha’s failure to attend the TRO hearing; (7) the failure to withdraw the Chawla declaration; and (8) Mr. Sinha’s loss of confidence in Gibson Dunn’s representation. (*Id.*) Citrix argues that these instances amount to a broad waiver of privilege as to the subject matter of the advice of counsel.

14. Workspot disputes Citrix’s characterizations of its arguments. Workspot responds that it has not disclosed privileged communications beyond the disclosures the court previously compelled it to produce. (D.I. 285 at 1) Furthermore, Workspot argues that some of the

¹ Amitabh Sinha, Workspot’s CEO, submitted a declaration in support of Workspot’s opposition to Citrix’s pending motion for sanctions. (D.I. 284, Ex. 3)

communications lack any privileged content, such as those concerning Mr. Sinha's attendance at the TRO hearing. (*Id.* at 3-4)

15. *Previously-disclosed communications.* The cited portions of Workspot's answering brief regarding Mr. Chawla's social media post, the preparation of the Chawla declaration, the failure to seek an extension to file a response to the TRO motion, and Gibson Dunn's advice regarding further investigative steps are supported by the previously-disclosed documents subject to the court's March 28, 2019 Memorandum Order. These documents were first relied upon by Citrix and were attached as exhibits to the declaration of Michael G. Strapp filed in support of Citrix's motion for sanctions. (D.I. 284, Ex. 1 at 4-5, 15 n.11, 16-18, 21; D.I. 262) Because Workspot did not inject these communications into the litigation, Workspot's citation to these communications does not amount to a further waiver of the attorney-client privilege. *See Wilmington Sav. Fund Soc'y, FSB v. Houston Cas. Co.*, C.A. No. 17-1867-MAK, 2018 WL 5043756, at *7 (D. Del. July 30, 2018) (concluding that the plaintiff had not waived the attorney-client privilege because the defendant was the party attempting to place the privileged communications at-issue).

16. A conclusion that Workspot waived the attorney-client privilege in this case would not advance the policy considerations underlying the advice-of-counsel exception to the privilege. Under Federal Rule of Evidence 502(a), subject matter waivers of the attorney-client privilege should be limited to circumstances in which a party intentionally and selectively discloses protected information in a misleading or unfair way. Fed. R. Evid. 502(a) Explanatory Note. In this case, Workspot objected to the disclosure of the privileged communications Citrix now cites in support of its motion for sanctions. (D.I. 186; D.I. 192) Workspot involuntarily disclosed the privileged communications to comply with the court's March 28, 2019

Memorandum Order. (D.I. 197 at ¶ 30) Accordingly, Workspot had no opportunity to selectively disclose the privileged communications relied upon by Citrix to support its motion for sanctions.² Workspot relies on the previously-disclosed privileged communications only to defend itself against accusations of wrongdoing by Citrix. *Cf. Brigham & Women's Hosp. Inc. v. Teva Pharms. USA, Inc.*, 707 F. Supp. 2d 463, 471 (D. Del. 2010) (“Plaintiffs are attempting to use the advice of counsel both as a sword to defeat the intent prong of inequitable conduct and as a shield to prevent defendants from obtaining information to prove intent to withhold information from the PTO. They cannot have it both ways.”).

17. Because Workspot does not wield the privileged communications as both a sword and a shield, the disclosure of additional attorney-client privileged communications is not necessary to reach an equitable, complete, and truthful resolution of Citrix’s motion for sanctions. *See Hoechst Celanese Corp. v. Nat’l Union Fire Ins. Co. of Pittsburg Pa.*, 623 A.2d 1118, 1125 (Del. Super. Ct. 1992).³ Citrix’s sanctions motion is supported by fifty-five exhibits,

² The non-selective, unbiased nature of the disclosure is apparent from certain documents which do not demonstrate that Workspot acted solely because of counsel’s advice. For example, Workspot argues that its investigative efforts prior to October 30, 2018 were based on advice received from Gibson Dunn: “In the short time window prior to the October 30 TRO opposition deadline, Gibson Dunn recommended that Kivu focus on analysis of Guerilla Mail demonstrating that IP address fields cannot always be relied on. . . . On October 28, Gibson Dunn confirmed that nothing further was needed from Workspot for Kivu’s investigation.” (D.I. 284, Ex. 1 at 5-6) However, communications regarding the retainer agreement with third-party forensic investigator Kivu suggest that Workspot’s in-house counsel sought to limit the scope of Kivu’s investigation due to cost considerations. (D.I. 262, Ex. 31 at WKSPT_0113823, WKSPT_0113831) (showing in-house counsel asking Gibson Dunn to revise the Kivu retainer agreement to limit the scope of work to the Guerilla Mail investigation).

³ In *Hoechst*, the court concluded that a review of privileged communications from the underlying litigation was necessary to the case before it because the plaintiff injected the issue of its compliance with the insurance policy terms into the litigation. 623 A.2d at 1125. The Delaware Superior Court expressed concern that the plaintiff insured would otherwise seek coverage for the claims while denying the insurer access to information about the underlying claims, thereby preventing the insurer from challenging the claims. *Id.* It is clear from the record presently before the court that Citrix has sufficient information to support its sanctions

many of which were produced pursuant to the court's March 28, 2019 Memorandum Order requiring the production of certain privileged communications pursuant to the crime-fraud and third-party disclosure exceptions. (D.I. 262) Citrix does not argue that the release of additional privileged communications is necessary for the court to reach an informed decision on the sanctions motion.

18. *Litigation hold.* Citrix argues that Workspot waived the attorney-client privilege by stating that Mr. Chawla's spoliation of evidence on his personal devices was contrary to Gibson Dunn's recommendations regarding a litigation hold.⁴ (D.I. 284 at 2) However, disclosing the existence and scope of a litigation hold does not amount to a privilege waiver. *See Major Tours, Inc. v. Colorel*, 2009 WL 2413631, at *2 (D.N.J. Aug. 4, 2009) (observing that, although litigation hold letters are generally privileged, "plaintiffs are entitled to know which categories of electronic storage information employees were instructed to preserve and collect, and what specific actions they were instructed to undertake to that end."); *see also In re eBay Seller Antitrust Litig.*, 2007 WL 2852364, at *2 (N.D. Cal. Oct. 2, 2007) ("Although plaintiffs may not be entitled to probe into what exactly eBay's employees were *told* by its attorneys, they are certainly entitled to know what eBay's employees are *doing* with respect to collecting and preserving ESI."). The Sinha declaration does not disclose more than the existence and distribution of the litigation hold and document retention policies. (D.I. 284, Ex. 3 at ¶ 8)

19. In response to Citrix's allegation that "Workspot and Chawla counsel also refused to produce forensic images of Chawla's devices," (D.I. 284, Ex. 2 at 9), Workspot discloses that

motion. Thus, the disclosure of additional privileged communications is not necessary to ensure "[a]n equitable, complete, and truthful resolution of the issues raised" by Citrix. *Id.*

⁴ Citrix did not discuss the existence of the litigation hold in its opening brief on the motion for sanctions. (D.I. 284, Ex. 2) Workspot raised the litigation hold in defense of its conduct for the first time in its answering brief. (*Id.*, Ex. 1 at 2-3)

“Mr. Chawla expressly violated Workspot’s standing instruction to preserve evidence related to the litigation,” and denies prior knowledge of Mr. Chawla’s concealment of evidence on his personal devices, (*id.*, Ex. 1 at 18). The Sinha declaration describes the disclosure of the litigation hold policies to Workspot’s employees, but it does not rely on the contents of the litigation hold letters themselves, which remain privileged. *See Magnetar Techs. Corp. v. Six Flags Theme Park Inc.*, 886 F. Supp. 2d 466, 482 (D. Del. 2012) (litigation hold letters are privileged, but the privilege may be lost when spoliation⁵ occurs).

20. TRO hearing attendance. The Sinha declaration discloses that Gibson Dunn advised Mr. Sinha “that it was not necessary that [he] attend the December 12 TRO hearing.” (D.I. 284, Ex. 3 at ¶ 20) This statement does not amount to the disclosure of substantive advice of counsel to prove a claim or defense. *See Rhone-Poulenc*, 32 F.3d at 862; *Glenmede*, 56 F.3d at 486. Although Mr. Sinha’s failure to attend the TRO hearing was not raised in Citrix’s opening brief, it does not rise to the level of a subject-matter waiver of the attorney-client privilege.

21. Loss of confidence in Gibson Dunn. Citrix contends that Workspot waived the privilege as a result of Mr. Sinha’s sworn statement that he lost confidence in Gibson Dunn’s advice after the December 12 TRO hearing because “it became clear that Gibson Dunn’s advice and opinions in the course of the investigation had been inaccurate and inadequate.” (D.I. 284 at 3; Ex. 3 at ¶ 24) A review of the associated privilege log entries Citrix seeks in connection with

⁵ The record before the court does not establish that Workspot waived the privilege over the litigation hold letters as a result of spoliation by Mr. Chawla. The evidence suggests that Mr. Chawla wiped his personal MacBook and iPhone, which were not devices under Workspot’s control. *See Bull v. United Parcel Serv., Inc.*, 665 F.3d 68, 73 (3d Cir. 2012) (“Spoliation occurs where: the evidence was in the party’s control. . . .”). Instead, the collection of spoliated data from Mr. Chawla’s personal devices is the subject of related litigation in the Northern District of California. (D.I. 284, Ex. 1 at 19; D.I. 276, Ex. K; D.I. 262, Ex. 52 at 8)

this alleged waiver shows that the vast majority of the communications occurred after the December 12 TRO hearing. (D.I. 284, Ex. 4 at Log Nos. 1, 3, 6, 13, 17, 64-81, 87, 105-06, 157-61, 191, 200, 210-11, 213-14, 220, 231, 298, 301, 329, 331, 333, 337, 357-58, 368, 374, 376-77, 381, 385, 405, 416, 426, 430-31, 435, 442, 449-51, 454-56, 464, 468-69, 475, 482-84, 506, 513) By way of its motion to compel, Citrix seeks a waiver of the attorney-client privilege based on reliance on the advice of counsel. (D.I. 284) Mr. Sinha's declaration makes clear that his loss of confidence in Gibson Dunn occurred as a result of statements made by the court during the December 12 TRO hearing. (*Id.*, Ex. 3 at ¶ 24) Consequently, privileged communications post-dating the December 12 TRO hearing do not reflect legal advice that was relied upon by Workspot.

22. The remaining documents sought by Citrix in connection with Mr. Sinha's loss of confidence in Gibson Dunn predate the December 12 TRO hearing. (D.I. 284, Ex. 4 at 551-53, 555, 560, 579-80, 582-83, 589, 591, 597-98, 620, 622, 625, 631-33, 636) Nonetheless, Mr. Sinha's declaration does not amount to a waiver of the privilege. Mr. Sinha does not identify any specific advice given by Gibson Dunn that he subsequently concluded was subpar. Mr. Sinha's generic statement that he lost confidence in Gibson Dunn and terminated the representation does not open the door to the disclosure of additional privileged communications. The statement does not amount to the disclosure of substantive advice of counsel to prove a claim or defense, as required to show a waiver based on reliance on the advice of counsel. *See Rhone-Poulenc*, 32 F.3d at 862; *Glenmede*, 56 F.3d at 486.

23. *Failure to formally withdraw the Chawla declaration.* Citrix contends that Workspot waived the attorney-client privilege by blaming Gibson Dunn for failing to formally withdraw the Chawla declaration. (D.I. 284 at 3) Mr. Sinha's declaration reiterates the language

of Workspot’s sur-reply brief on the TRO motion. (D.I. 284, Ex. 3 at ¶ 19) The sur-reply brief states that Workspot no longer seeks to rely on the Chawla declaration and asks the court not to rely on the Chawla declaration in deciding the TRO motion. (D.I. 129 at 6 n.3) In his declaration, Mr. Sinha stated that he understood this to be “sufficient to inform the Court that it should not rely on Mr. Chawla’s sworn declaration.” (D.I. 284, Ex. 3 at ¶ 19) Contrary to Citrix’s representations, Mr. Sinha does not explicitly suggest that Gibson Dunn was to blame for failing to withdraw the Chawla declaration. The statement does not amount to the disclosure of substantive advice of counsel to prove a claim or defense, as required to show a waiver based on reliance on the advice of counsel. *See Rhone-Poulenc*, 32 F.3d at 862; *Glenmede*, 56 F.3d at 486.

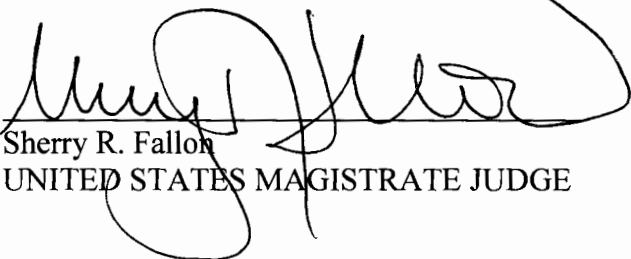
24. Conclusion. For the foregoing reasons, IT IS HEREBY ORDERED THAT Citrix’s motion to compel is DENIED. (D.I. 284)

25. Given that the court has relied upon material that technically remains under seal, the court is releasing this Memorandum Order under seal, pending review by the parties. In the unlikely event that the parties believe that certain material in this Memorandum Order should be redacted, the parties shall jointly submit a proposed redacted version by no later than **November 27, 2019**, for review by the court, along with a motion supported by a declaration that includes a clear, factually detailed explanation as to why disclosure of any proposed redacted material would “work a clearly defined and serious injury to the party seeking closure.” *See In re Avandia Mktg., Sales Practices & Prods. Liab. Litig.*, 924 F.3d 662, 672 (3d Cir. 2019) (quoting *Miller v. Ind. Hosp.*, 16 F.3d 549, 551 (3d Cir. 1994) (internal quotation marks omitted)). If the parties do not file a proposed redacted version and corresponding motion, or if the court

determines the motion lacks a meritorious basis, the documents will be unsealed within thirty (30) days of the date the Memorandum Order issued.

26. This Memorandum Order is filed pursuant to 28 U.S.C. § 636(b)(1)(A), Fed. R. Civ. P. 72(a), and D. Del. LR 72.1(a)(2). The parties may serve and file specific written objections within seven (7) days after being served with a copy of this Memorandum Order. Fed. R. Civ. P. 72(a). The objections and responses to the objections are limited to five (5) pages each.

27. The parties are directed to the court's Standing Order For Objections Filed Under Fed. R. Civ. P. 72, dated October 9, 2013, a copy of which is available on the court's website, www.ded.uscourts.gov.



Sherry R. Fallon
UNITED STATES MAGISTRATE JUDGE