IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
EASTERN DIVISION

HOPE FOR FAMILIES & COMMUNITY SERVICE, INC., *et al.,*	)	
Plaintiffs,	)	
v.	)	CASE NO. 3:06-CV-1113-WKW
DAVID WARREN, *et al.*,	)	
Defendants.	)	

MEMORANDUM OPINION AND ORDER

Before the court is a Motion to Compel Production of Documents or, in the Alternative, Submission of Documents to the Court for *In Camera Review* and Determination of Privilege (Doc. # 236), filed by Defendant Macon County Greyhound Park, Inc., d/b/a VictoryLand ("VictoryLand"). VictoryLand moves to compel non-parties Steve Windom and Steve Windom LLC (collectively "Windom") to produce certain documents listed on Windom's privilege log or, in the alternative, to submit those documents to the court for *in camera* review. Two responses to VictoryLand's motion have been filed, one by Windom (Doc. # 249), and the second by Plaintiff Lucky Palace, LLC ("Lucky Palace") (Doc. # 280).

The court ordered an *in camera* review of the documents identified on Windom's privilege log, and directed Lucky Palace to file an *in camera* brief. (Doc. # 258 at 1.) The court received those documents and the *in camera* brief on February 19, 2009, and directed Lucky Palace to redact those portions of its *in camera* brief that recited allegedly privileged communications and to file the redacted brief under seal (Doc. # 282). Lucky Palace

complied. (Doc. # 289.) Also, Windom filed a Notice of Supplemental Production. (Doc. # 296.) Reply briefs have been filed, one by VictoryLand (Doc. # 306), and one by both VictoryLand and Defendant Milton McGregor (collectively "Defendants") (Doc. # 308). For the reasons to follow, the motion will be denied.

I. BACKGROUND

A pivotal issue concerns the nature of the relationship between Windom and Lucky Palace. These facts speak to that issue. Mr. Windom is a licensed attorney in the State of Alabama and former state senator and lieutenant governor for the State of Alabama. Mr. Windom formed Steve Windom, LLC ("Windom, LLC") in January 2003 for the purpose of providing lobbying and consulting services, and his company's consulting services were retained by Lucky Palace in January 2006. Lucky Palace, a limited liability company, was "formed for the purpose of obtaining a license to operate bingo in Macon County, Alabama." (Paul Bracy Aff. ¶ 3 (Ex. to Doc. # 280).)[1]

Pursuant to the consulting contract between Windom and Lucky Palace entered into on January 9, 2006 (Bracy Aff. ¶ 4), Windom agreed to provide governmental relations and campaign consulting services to Lucky Palace, Lucky Palace, Inc. and Libra Securities,

[1] Paul Bracy is Lucky Palace's president.

LLC.[2] (Exs. 285 & 286 to Windom Dep. (Doc. # 274).) In addition to Mr. Windom, Steve Raby ("Raby") was a party to the Lucky Palace contract for consulting services.[3] (Exs. 285 & 286 to Windom Dep.) The recited purpose of the contract was "to secure a document signed by the Sheriff of Macon County authorizing Client to operate bingo games in Macon County, Alabama." (Exs. 285 & 286 to Windom Dep.) The contract provided that, if the consultants obtained that executed document prior to December 31, 2007, they would receive a bonus.[4] (Ex. 286 to Windom Dep.; Windom Dep. at 86, 227.) Other contractual responsibilities included overseeing efforts to find a formidable opponent to run against Sheriff David Warren ("Sheriff Warren")[5] in the then-upcoming election and spearheading the campaign for the chosen opponent.[6] (Ex. 285 to Windom Dep.; Windom Dep. 71 (explaining the collaborative "strategy of running a reasonably well-funded campaign to

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[2] Libra Securities, LLC, is a wholly-owned subsidiary of Libra Securities Holdings, LLC. (Doc. # 264 n.1.) Libra Securities Holdings, LLC, owns 375,000 units of shares in Lucky Palace (Doc. # 264 n.1), and the president of Libra Securities Holdings, LLC, Jess Ravich, "personally owns" 625,000 units of shares in Lucky Palace (Doc. # 264 n.1). Collectively, Libra Securities Holdings, LLC, and Mr. Ravich have a sixteen-percent ownership interest in Lucky Palace. (Doc. # 216 at 4.) "Libra is in partnership with Lucky Palace to secure financing and to raise capital for the eventual opening of Bingo operations in Shorter[, Alabama]." (Doc. # 264 n.1.)

[3] *See* Windom Dep., for details of Mr. Raby's consulting role.

[4] They did not obtain that document.

[5] Sheriff Warren also is a Defendant in this lawsuit.

[6] The campaign component of the contract included advising Lucky Palace on making campaign contributions, securing and designing billboards, engaging a direct mail firm and overseeing a direct mail campaign, engaging a phone bank firm and overseeing phone bank efforts, engaging a firm to produce and place radio advertisements, and engaging and overseeing political operatives in Macon County to support the campaign. (Ex. 285 to Windom Dep.)

defeat the sheriff").) The contract also provided that Windom's and Mr. Raby's companies would serve as independent contractors. (Exs. 285 & 286 to Windom Dep.)

In furtherance of this contract, Mr. Windom had "constant interaction" with Lucky Palace's representatives and was "intimately involved" with efforts to secure a bingo license for Lucky Palace. (Bracy Aff. ¶¶ 5-6.) He was authorized by Lucky Palace to communicate directly with its attorneys in order to further Lucky Palace's objective to obtain a bingo license (Bracy Aff. ¶ 9), and Lucky Palace considered all of its communications with its attorneys as confidential and did not intend to waive the attorney-client privilege when Mr. Windom was a party to those communications (Bracy Aff. ¶ 7). Mr. Windom "had intimate knowledge of the efforts taken to secure a bingo license for Lucky Palace and had information which was relevant to Lucky Palace's reasons for seeking representation." (Bracy Aff. ¶ 8.) Mr. Windom also "work[ed] with Lucky Palace and it's [sic] counsel in matters critical to Lucky Palace's position in litigation." (Bracy Aff. ¶ 6.)

During the pendency of the consulting contract, Mr. Windom became an investor in Lucky Palace, apparently to assist in funding litigation. (Windom Dep. at 185.) He was an investor in Lucky Palace, beginning in late September or October, 2006, and ending in June 2007. (Doc. # 236 at 2-5 (citing Windom Dep. 16, 47).)

In relation to this litigation, Windom withheld certain documents requested by VictoryLand and Mr. McGregor, pursuant to a Rule 45 subpoena and a Rule 30(b) deposition notice and document request. The alleged privileged communications are outlined in a

privilege log (*see* Ex. I to Doc. # 236) and consist of emails which were transmitted between April 11, 2006, and August 28, 2007.[7] Some of the emails specifically mentioned this lawsuit which was filed on December 18, 2006; others referenced a related case in which Lucky Palace was not a party, but which was pending before the undersigned from March 9, 2006, to June 12, 2008 (3:06cv224) and was relevant to Lucky Palace's then-anticipated lawsuit. Four emails were transmitted by Mr. Windom. As to the other emails, Mr. Windom either was the direct recipient or was copied on the email. A few emails were exchanged between Mr. Windom and Mr. Bracy. One was sent from Mr. Raby to Mr. Windom, and another was between Mr. Windom and an attorney for the Macon County nonprofit organizations which have joined Lucky Palace as co-Plaintiffs in this lawsuit ("Charities"). The majority of the emails were communications between Mr. Windom, Lucky Palace's attorneys[8] and at least one of Lucky Palace's non-attorney representatives (*i.e.*, either Mr. Bracy or Mr. Jess Ravich ("Ravich"), *see supra* note 2).

At his deposition taken on November 18, 2008, Mr. Windom, through his attorney (Robert Bernard Harwood, Esq.), invoked the attorney-client privilege as to the withheld email communications. He asserted that "Mr. Windom was an investor in . . . Lucky Palace . . . and[,] during that period of time and immediately leading up to it[,] he was privy to

[7] Each document on this privilege log is assigned a number in the left-hand column of that log and, in this opinion, is identified by that assigned number.

[8] At the time the communications were made, the attorneys with Bradley Arant Rose & White who either sent, authored, or were copied on the emails were Gary Huckaby, Hall Bryant, Erika Jenke-Huber and Mike Huff.

various discussions, communications, both written and verbal, relating to litigation strategy and things of that sort." (Doc. # 236 at 2 (citing Windom Dep. at 14).) The assertion also was that Mr. Windom was part of a "client group." As stated at the deposition by Mr. Windom's counsel, Lucky Palace has "expressed the view that there was this situation where he (Mr. Windom) had been a participant in certain communications and exchanges once he became an investor or immediately leading up to it whereby [Lucky Palace] would have considered that he was part of the client group." (Doc. # 236 (citing Windom Dep. at 14).)

In a letter to counsel for Windom, Mr. McGregor and VictoryLand argued that the majority of the communications listed on Windom's privilege log did not fall within the time frame for which Windom claimed the attorney-client privilege on the basis of his status as one of Lucky Palace's investors. (Ex. H to Doc. # 236; *see also* Doc. # 236 at 4-5.) Mr. McGregor and VictoryLand also requested an updated privilege log, to include all the recipients of the allegedly privileged documents. (Ex. H to Doc. # 236.) Mr. Windom supplied them with an "expanded privilege log." (Doc. # 236 ¶ 11; Ex. I to Doc. # 236.) At the same time, as a concluding notation on the expanded privilege log (Ex. I to Doc. # 236), Mr. Windom asserted that his claim of attorney-client privilege for certain documents was "based not only on his status for a time as an investor in Lucky Palace, LLC, but also on his awareness of the contention by Lucky Palace that some of his communications to its personnel were as an attorney." (Ex. I to Doc. # 236.) Although in his response to the pending motion to compel, Mr. Windom again mentions Lucky Palace's assertion, he repeats

what he said during his deposition, that "[i]n [his] opinion [he] never rendered any legal services, only political consulting services during the time [he] was a consultant and then when [he] was an investor, [he] was an investor." (Doc. # 249 at 1-2; Windom Dep. 17.) Mr. Windom, however, cites correspondence that he received from Steve Heninger, Esq. ("Heninger"), in which Mr. Heninger says, "We asserted that you did work as an attorney. The correspondence and agreement stated otherwise, but I still think you filled the attorney role on some aspects."[9] (Doc. # 249 at 1.)

II. DISCUSSION

Fifteen documents of the forty-seven listed on the expanded privilege log are no longer at issue. In its *in camera* brief, as redacted and filed under seal (Doc. # 289), Lucky Palace concedes that fifteen documents on the expanded privilege log are discoverable; those documents to which Lucky Palace "claims no privilege" are documents numbered 4, 5, 14, 24, 25, 26, 27, 28, 29, 30, 34, 36, 37, 38 and 39. (Doc. # 289.) Windom filed a notice with the court indicating that these documents have been produced to all counsel of record. (Doc. # 296.) The motion to compel as to these documents, therefore, is due to be denied as moot.

The remaining thirty-two documents at issue are thus refined down to core documents embedded with elemental issues of privilege. Lucky Palace argues that all thirty-two documents are protected by the attorney-client privilege and its corollaries, namely, the

[9] This theory for invoking the attorney-client privilege – *i.e.*, Mr. Windom as Lucky Palace's attorney – was not raised by Lucky Palace in its brief. (*See* Doc. # 280.) It is deemed abandoned, and is not considered here, but it is noted that Mr. Windom strongly objects to the categorization that he acted as Lucky Palace's attorney.

common legal interest doctrine and the theory that an independent contractor can act as a client's "representative." (Doc. # 280 at 11.) Lucky Palace also contends that some of the emails are protected by the attorney-client privilege given Mr. Windom's status for a time as an investor in Lucky Palace. As to seven of those disputed documents, Lucky Palace also invokes the work product doctrine and, as to another six, the joint defense doctrine. (*See* Docs. # 280, 289.)

It is necessary to summarize the law pertaining to the theories relied upon by Lucky Palace, as well as the primary legal authorities cited by the parties in support of and in opposition to disclosure of the communications at issue. The analysis follows.

A. **Principles of Law**

1. Attorney-Client Privilege

Federal privilege law governs the application of the attorney-client privilege because the court has federal question jurisdiction over the subject matter. *See* Fed. R. Evid. 501, advisory committee's note ("In non-diversity jurisdiction civil cases, federal privilege law will generally apply."). "The attorney-client privilege exists to protect confidential communications between client and lawyer made for the purpose of securing legal advice." *In re Grand Jury Proceedings 88-9*, 899 F.2d 1039, 1042 (11th Cir. 1990) (citation and internal quotation marks omitted); *see also Upjohn Co. v. United States*, 449 U.S. 383, 390 (1981) ("[T]he privilege exists to protect not only the giving of professional advice to those who can act on it but also the giving of information to the lawyer to enable him to give sound

and informed advice."). The privilege encourages "full and frank communication between attorneys and their clients and thereby promote[s] broader public interests in the observance of law and the administration of justice." *Upjohn Co.*, 449 U.S. at 389.

"The party invoking the attorney-client privilege has the burden of proving that an attorney-client relationship existed and that the particular communications were confidential." *Bogle v. McClure*, 332 F.3d 1347, 1358 (11th Cir. 2003) (citations and internal quotation marks omitted). "To determine if a particular communication is confidential and protected by the attorney-client privilege, the privilege holder must prove the communication was '(1) intended to remain confidential and (2) under the circumstances was *reasonably* expected and understood to be confidential.'" *Id.* (quoting *United States v. Bell*, 776 F.2d 965, 971 (11th Cir. 1985)).

The essence of Defendants' argument is that disclosure to Mr. Windom of communications that occurred between Lucky Palace's agents and attorneys destroys any claim of confidentiality and possible application of the attorney-client privilege. As a general rule, a client's and his attorney's communications are not deemed confidential when made in the presence of a third party. *See United States v. Gordon-Nikkar*, 518 F.2d 972, 975 (5th Cir. 1975).[10] There, however, are exceptions.

[10] In *Bonner v. City of Prichard, Ala.*, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc), the Eleventh Circuit adopted as binding precedent all decisions handed down by the former Fifth Circuit prior to October 1, 1981.

Lucky Palace says that the exceptions discussed in *In re Bieter Co.* ("*Bieter*"), 16 F.3d 929 (8th Cir. 1994) (independent consultant as client's representative), and *United States v. BDO Seidman, LLP* ("*Seidman*"), 492 F.3d 806 (7th Cir. 2007) (common legal interest doctrine), apply to attorney-client communications conveyed to Mr. Windom so as not to destroy the attorney-client privilege. VictoryLand and Mr. McGregor disagree. First, they assert that *Bieter* is distinguishable and that the principles announced in *In re New York Renu with Moistureloc Product Liability Litigation* (*"Renu"*), No. MDL 1785, 2:06-MN-77777-DCN, 2008 WL 2338552 (D.S.C. May 8, 2008), and *Haugh v. Schroder Investment Management North America Inc.*, No. 02 Civ.7955 DLC, 2003 WL 21998674 (S.D.N.Y. Aug. 25, 2003), dictate a contrary result. Second, they argue that the common legal interest doctrine espoused in *Seidman* is inapplicable because Lucky Palace has failed to show how "[Mr.] Windom's position as a political consultant to [it] is anything other than a business relationship." (Doc. # 306 at 8.)

a. *Bieter*

In *Bieter*, the plaintiff was Bieter Company ("Bieter"), a partnership formed for the purpose of commercially developing farmland. Bieter hired a consultant "to provide advice and guidance regarding commercial and retail development," specifically, to assist Bieter in securing tenants for the development, *Bieter*, 16 F.3d at 933. The contract between Bieter and the consultant provided that the consultant would work out of Bieter's office and that the consultant was an "independent contractor," and was "not an agent, employee, or partner of

Bieter." *Id.* at 933-34. The consultant had "daily interaction" with the principals of Bieter pertaining to the commercial development of the farmland, *id.* at 933, and in the subsequent litigation resulting from the failure of Bieter to develop the property, *id.* at 931, 934, and city officials, potential tenants and the media, as well as Bieter's counsel, viewed the consultant as Bieter's "representative," *id.* at 934. Moreover, the consultant's "involvement with [Bieter's] counsel was rather extensive." *Id.* The consultant attended meetings with counsel, "either alone or with [the client]," and "received many communications from attorneys, both those sent directly to him and those on which he was copied," *id.*, and Bieter's counsel "worked closely with" the consultant "as th[e] litigation developed," *id.*

In the RICO lawsuit, commenced by Bieter as a result of its failed attempts to develop the farmland commercially, *see id.* at 930, 934, the defendants sought disclosure of documents evidencing communications between the consultant and Bieter's attorney. Bieter, in turn, claimed that those documents were protected by the attorney-client privilege. Summing up the issue, the Eighth Circuit said,

> In short, the case presents an individual who, while acting as an independent consultant to the client, has been involved initially in the attempt to develop a parcel of property (the development of which appears to be the *sine qua non* of the client's existence) and subsequently in the litigation that resulted from the failure to develop said property. Despite any assertions to the contrary, it appears that this consultant was neither the client nor an employee of the client, but was instead a representative of the client. The legal question presented is whether communications either between this consultant and counsel or merely disclosed to the consultant necessarily fall outside of the scope of the attorney-client privilege because the consultant was neither the client nor an employee of the client.

Id. at 934.

The *Bieter* court found Supreme Court Standard 503(b) "useful," even though it was never enacted. *Id.* at 935; *see also Seidman*, 492 F.3d at 815 (Standard 503 "has been recognized 'as a source of general guidance regarding federal common law principles.'" (citation omitted)). It recognized that the proposed rule expressly protected communications between a client's lawyers and a client's representative, *Bieter*, 16 F.3d at 935, but at the same time did not define "representative," *id.* The Eighth Circuit examined the "only two analogous situations" it could find. *Id.* at 936 (citing *McCaugherty v. Siffermann*, 132 F.R.D. 234, 239 (N.D. Cal. 1990), for its conclusion that, under *Upjohn Co. v. United States*, 449 U.S. 383 (1981), "the privilege would apply to communications between two independent consultants hired by the client and the client's lawyers just as it would apply to communications between the client's employees and its lawyers," and John E. Sexton, *A Post-Upjohn Consideration of the Corporate Attorney-Client Privilege*, 57 N.Y.U.L.Rev. 443, 498 (1982), for its argument that "at times there will be potential information-givers who are not employees of the corporation but who are nonetheless meaningfully associated with the corporation in a way that makes it appropriate to consider them 'insiders' for purposes of the privilege."). Finding these two sources persuasive, the Eighth Circuit concluded that, "when applying the attorney-client privilege to a corporation or partnership, it is inappropriate to distinguish between those on the client's payroll and those who are instead, and for whatever reason, employed as independent contractors." *Id.* at 937. On the

facts presented, the Eighth Circuit concluded that the nature of the relationship between Bieter and the consultant – *i.e.*, the consultant's daily interactions with Bieter and third parties in furtherance of Bieter's "single objective" to commercially develop farmland; the consultant's expertise in commercial development offered to Bieter; and the information garnered by the consultant as Bieter's sole representative at certain meetings – and "his involvement in the subject of the litigation ma[d]e him precisely the sort of person with whom a lawyer would wish to confer confidentially in order to understand Bieter's reasons for seeking representation." *Id.* at 938.

The Eighth Circuit's conclusion that the consultant-corporation relationship justified application of the privilege was the first hurdle, but did not end the inquiry. The communications also had to satisfy the test used to examine the applicability of the attorney-client privilege in the corporate-employee setting. That test, as adapted in *Bieter*, provides that

> "the attorney-client privilege is applicable to an [independent contractor's] communication if (1) the communication was made for the purpose of securing legal advice; (2) the [independent contractor] making the communication did so at the direction of [the corporation]; (3) the [corporation] made the request so that the corporation could secure legal advice; (4) the subject matter of the communication is within the scope of the [independent contractor's] duties; and (5) the communication is not disseminated beyond those persons who, because of the corporate structure, need to know its contents."

Id. at 936 (quoting *Diversified Indus., Inc. v. Meredith*, 572 F.2d 596, 599 (8th Cir. 1977) (brackets added)). The burden is on the party claiming the privilege "to show that the communications at issue meet all of the [five] requirements." *Id.* (brackets added).

Analyzing each of *Diversified*'s five factors, *see id.* at 939, the Eighth Circuit concluded that the attorney-client privilege applied to communications between the consultant and Bieter's attorney. *Id.* at 940. The consultant was "for purposes of the privilege, the functional equivalent of Bieter's employee, and the communications in question fell within the scope of his duties, were made at the behest of his superior, and were made for the purpose of seeking legal advice for Bieter." *Id.*

b. *Renu* and *Haugh*

In *Renu*, the court reviewed the law concerning privilege as it relates to public relations consultants.[11] The court began by observing that "[c]ommunications to non-lawyers can be brought within the privilege under the *Kovel* doctrine." *See* 2008 WL 2338552, at *7 (citing *United States v. Kovel,* 296 F.2d 918 (2d Cir. 1961)). *Kovel* "held that confidential communications to non-lawyers could be protected by the privilege if the non-lawyer's services are necessary to the legal representation." *Id.* To be entitled to protection, the services performed by the non-lawyer must have been "necessary to promote the lawyer's effectiveness[,]" rather than merely beneficial to the client in "some way unrelated to the legal services of the lawyer." *Id.* (internal citation omitted). "[B]asic public relations advice, from a consultant hired by the corporate client, is not within the privilege." *Id.*

[11] Although the court applied New York privilege law, "[f]ederal courts have recognized that the New York law of privilege is substantially similar to federal common law." *Renu,* 2008 WL 2338552, at *1; *see also NXIVM Corp. v. O'Hara,* 241 F.R.D. 109, 124 (N.D.N.Y. 2007) ("[T]he distinction between New York and federal law on attorney-client privilege is quite indistinguishable, as the law intersects in all of its facets, and are viewed interchangeably.").

The *Renu* court cited *Haugh* for its summary of the "basic law" in the area pertaining to consultants and the attorney-client privilege. *Renu*, 2008 WL 2338552, *8. In *Haugh*, a public relations consultant, who also was a licensed attorney, was hired by a civil litigant's attorney pursuant to a written agreement to provide and assist in "'providing legal services to [plaintiff].'" 2003 WL 21998674, at *1. The agreement also provided that all communications were "'confidential and privileged.'" *Id.* It was expected by the plaintiff's attorney that the consultant would handle "media strategy as it impacted on . . . litigation." *Id.* To that end, the consultant prepared a press release when the lawsuit was filed, provided advice to the plaintiff's attorney as to potential "public reactions," answered inquiries from the media, participated in meetings with the plaintiff and her attorney held for the dual purpose of developing litigation and media strategies. *Id.* The documents sought to be protected were sent primarily from the plaintiff to the consultant, with copies also provided to the plaintiff's attorney. *Id.* at *2. The documents contained "no requests for legal advice." *Id.*

The *Haugh* court recognized that there was "precedent for expanding the attorney-client privilege to those assisting a lawyer in representing a client," *id.* at *3, but that the expansion should be "'cautiously extended,'" *id.* (quoting *United States v. Weissman*, 195 F.3d 96, 100 (2d Cir. 1999)). The court concluded that, notwithstanding the contractual provisions between the attorney and the consultant, an expansion was not warranted because there was an insufficient showing that "the communications were made for the purpose of

obtaining legal advice from [the plaintiff's] attorney as opposed to public relations advice from [the consultant]." *Id.* The evidence demonstrated that the consultant performed "standard public relations services," and there was no showing that the plaintiff's communications with either her attorney or the consultant "were necessary so that [the attorney] could provide [the plaintiff] with legal advice." *Id.* Nor did the plaintiff identify "any legal advice that required the assistance of a public relations consultant." *Id.* The fact that documents were sent to counsel at the same time as the consultant did not preserve the privilege. *Id.* "A media campaign is not legal strategy." *Id.* at *4. "Some attorneys may feel it is desirable at times to conduct a media campaign, but that decision does not transform their coordination of a campaign into legal advice." *Id.*

c. *Seidman*'s Common Legal Interest Doctrine

In *Seidman*, relied upon by Lucky Palace (Doc. # 280 at 11), the Seventh Circuit explained that, "[a]lthough occasionally termed a privilege itself, the common interest doctrine is really an exception to the rule that no privilege attaches to communications between a client and an attorney in the presence of a third person," *Seidman*, 492 F.3d at 815. In that case, the Internal Revenue Service ("IRS") was investigating BDO Seidman, LLP ("Seidman"), an accounting firm, based upon accusations that Seidman had failed to comply with the Internal Revenue Code by promoting potentially abusive tax shelters without maintaining a list of the individuals who had bought an interest in those shelters. *See id.* When Seidman refused to comply with the IRS's summonses, the IRS petitioned the federal

district court for enforcement. *See id.* at 809. Seidman raised several objections, including that some of the documents summoned were protected by the attorney-client privilege. *See id.*

One issue on appeal, which is pertinent to the present dispute in this case, was whether a memorandum authored by a lawyer/partner of Seidman to Seidman's outside counsel (a tax attorney), requesting legal advice on pending IRS regulations, was protected when it was disclosed to a third party. That third party was another law firm ("third-party law firm") that did not represent Seidman, but that served some of the same clients as Seidman with respect to certain tax products. *Id.* at 813, 816. The third-party law firm allegedly received the letter from Seidman as input into an opinion letter regarding tax shelters that it (the third-party law firm) was preparing for both Seidman and their common clients. *Id.* at 813. There was no litigation pending when the third-party law firm received the memorandum at issue. *Id.* The district court found that the disclosure of the memorandum to the third-party law firm "did not waive [Seidman's] claim of privilege because the memorandum related to a common legal interest shared by [Seidman] and [the third-party law firm] and therefore fell within the common interest doctrine." *Id.* at 813-14 (brackets added).

Reviewing whether the district court erred, the Seventh Circuit looked to the proposed, but rejected, Supreme Court Standard 503 for authority as to the general principles governing the attorney-client privilege. *Id.* at 814-15. Specific to the common legal interest doctrine, the court explained:

> In effect, the common interest doctrine extends the attorney-client privilege to otherwise non-confidential communications in limited circumstances. For that reason, the common interest doctrine only will apply where the parties undertake a joint effort with respect to a common legal interest, and the doctrine is limited strictly to those communications made to further an ongoing enterprise. Other than these limits, however, the common defense doctrine does not contract the attorney-client privilege. Thus, communications need not be made in anticipation of litigation to fall within the common interest doctrine. Applying the common interest doctrine to the full range of communications otherwise protected by the attorney-client privilege encourages parties with a shared legal interest to seek legal "assistance in order to meet legal requirements and to plan their conduct" accordingly. This planning serves the public interest by advancing compliance with the law, "facilitating the administration of justice" and averting litigation. Reason and experience demonstrate that joint venturers, no less than individuals, benefit from planning their activities based on sound legal advice predicated upon open communication.

Id. at 815-16 (internal citations omitted). Applying these principles, the *Seidman* court found no error in the district court's conclusion that Seidman and the third-party law firm, "acting as joint venturers, shared a common legal interest 'in ensuring compliance with the new regulation issued by the IRS, and in making sure that they could defend their product against potential IRS enforcement actions.'" *Id.* at 816 (internal citation omitted). The Seventh Circuit explained, that there was ample evidence that, through the memorandum at issue, "two joint venturers, [Seidman] and [third-party law firm], undertook a consultation between their respective in-house counsel and [Seidman]'s outside counsel with respect to the legality of the proposed financial course of action they would recommend to their common clients." *Id.* at 817. "This effort . . . was clearly within the scope of the common interest doctrine." *Id.* The memorandum, thus, was privileged. *See id.*

2. Work-Product Doctrine

The work-product doctrine "protects from disclosure materials prepared by an attorney acting for his client in anticipation of litigation." *In re Grand Jury Proceedings*, 601 F.2d 162, 171 (5th Cir. 1979). Tracing the origins of the attorney work-product doctrine to a Supreme Court decision decided more than sixty years ago, the Eleventh Circuit reiterated that "'it is essential that a lawyer work with a certain degree of privacy, free from unnecessary intrusion by opposing parties and their counsel.'" *Cox v. Adm'r U.S. Steel & Carnegie*, 17 F.3d 1386, 1421 (11th Cir.) (quoting *Hickman v. Taylor*, 329 U.S. 495, 510-11 (1947)), *modified on other grounds*, 30 F.3d 1347 (11th Cir. 1994). "This doctrine is distinct from and broader than the attorney-client privilege[] . . . ; it protects materials prepared by the attorney, whether or not disclosed to the client, and it protects material prepared by agents for the attorney." *In re Grand Jury Proceedings*, 601 F.2d at 171.

Federal Rule of Civil Procedure 26(b)(3) embodies the work-product doctrine, providing that "[o]rdinarily, a party may not discover documents and tangible things that are prepared in anticipation of litigation or for trial by or for another party or its representative (including the other party's attorney, consultant, surety, indemnitor, insurer, or agent)." Fed. R. Civ. P. 26(b)(3). As explained by the D.C. Circuit, "Work product immunity covers not only confidential communications between the attorney and client. It also attaches to other materials prepared by attorneys (and their agents) in anticipation of litigation." *In re Sealed Case*, 107 F.3d 46, 51 (D.C. Cir. 1997); *see also* Charles Alan Wright, Arthur R. Miller, and

Richard L. Marcus, *8 Federal Practice & Procedure* § 2024 (2d ed. 1994) (Different from the purpose of the attorney-client privilege, "the purpose of the work-product rule 'is not to protect the evidence from disclosure to the outside world but rather to protect it only from the knowledge of opposing counsel and his client, thereby preventing its use against the lawyer gathering the materials.'" (citation omitted)). Furthermore, "because the work product privilege looks to the vitality of the adversary system rather than simply seeking to preserve confidentiality, it is not automatically waived by the disclosure to a third party." *In re Grand Jury Subpoena*, 220 F.3d 406, 409 (5th Cir. 2000).

Like the attorney-client privilege, the party seeking to assert the work-product doctrine bears the initial burden of demonstrating that the document satisfies the definition of work product. *In re Grand Jury Subpoena*, 510 F.3d 180, 183 (2d Cir. 2007); *United States v. Roxworthy*, 457 F.3d 590, 593 (6th Cir. 2006). Once that showing is made, the burden shifts, and "Rule 26(b)(3) . . . places a twofold burden on the party seeking discovery. The [party] must show both substantial need and undue hardship." *Castle v. Sangamo Weston, Inc.*, 744 F.2d 1464, 1467 (11th Cir. 1984) (citation omitted).

B. Analysis

1. Attorney-Client Privilege: Bieter and Seidman

a. Emails # 1, 6, 7, 8, 9, 10, 11, 12, 13, 15, 16, 17, 18, 19, 20, 21, 22, 23, 31, 32, 35 and 41

i. *Bieter*

All thirty-two communications at issue involve Mr. Windom, either as the sender, the recipient or a copied party. Relying on *Bieter*, Lucky Palace says that Windom "worked closely with [it] in both its attempt to obtain a bingo operator's license and in the subsequent litigation arising out of its failure to obtain a bingo license." (Doc. # 280 at 1-2.) Drawing from the language of the unenacted "Supreme Court Standard 503(b)" (Doc. # 280 at 3-4), as cited in *Bieter*, Lucky Palace contends that the relationship between it and its independent consultant (Windom) supports the conclusion that Windom acted as the "representative" of Lucky Palace, for purposes of applying the attorney-client privilege.[12] According to Lucky Palace, the majority of the disputed documents on the privilege log constitute

[12] Standard 503(b) provides, in part, as follows:

> A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client, (1) between himself or his representative and his lawyer or his lawyer's representative, or (2) between his lawyer and his lawyer's representative, or (3) by him or his lawyer to a lawyer representing another in a matter of common interest, or (4) *between representatives of the client or between the client and a representative of the client*, or (5) between lawyers representing the client.

Supreme Court Standard 503(b) (emphasis added), cited in *Bieter*, 16 F.3d at 935.

communications between Mr. Windom as a "representative" of Lucky Palace, and Lucky Palace's agents or attorneys and, thus, are privileged. (Doc. # 280 at 2-9.)

Citing *Renu* and *Haugh*, VictoryLand and Mr. McGregor, on the other hand, contend that "[t]he services provided by Windom were basic public relations services that would be provided by any political consultant." (Doc. # 306 at 6.) In other words, they say that "Windom's services were not services necessary to the legal representation of [Lucky Palace]," and that, therefore, any communications between Lucky Palace and Windom or between Lucky Palace's attorneys or agents and Mr. Windom "are not protected by the attorney-client privilege." (Doc. # 306 at 6.)

The court is persuaded by *Bieter*'s thorough analysis and reasoning.[13] The first *Bieter* inquiry is whether there is a sufficient factual basis from which to conclude that Mr. Windom's relationship with Lucky Palace is the type that justifies the application of the

[13] The parties have not cited, nor has the court found, any published Eleventh Circuit decisions applying *Bieter*. District courts in this circuit, however, have found *Bieter* to be persuasive authority. *See Every Penny Counts, Inc. v. Am. Express Co.*, No. 8:07cv1255, 2008 WL 2074407, at *2 (M.D. Fla. May 15, 2008) ("The Eighth Circuit has recognized that the attorney-client privilege may be extended to include consultants of a corporation. The relationship arises when an attorney needs to be able to confer confidentially with 'nonemployees who, due to their relationship to the client, possess the very sort of information that the privilege envisions flowing most freely.'" (citing *Bieter Co.*, 16 F.3d at 929)); *Abdallah v. Coca-Cola Co.*, No. 1:98cv3679, 2000 WL 33249254, at *3 (N.D. Ga. Jan. 25, 2000) ("Where counsel seeks and obtains outside consulting services, the attorney-client privilege has been extended to such third parties 'employed to assist a lawyer in the rendition of legal services.'"); *Burlington Indus., Inc. v. Rossville Yarn, Inc.*, No. 495-CV-0401, 1997 WL 404319, at *3 (N.D. Ga. June 3, 1997) (An independent contractor can be a "'representative'" for purposes of applying the attorney client privilege (citing *Bieter*, among others)). Moreover, at the same time, no Eleventh Circuit decision has been cited by the parties or found by the court that rejects *Bieter*'s general principles.

attorney-client privilege.[14] *See Bieter*, 16 F.3d at 938. The court agrees with Lucky Palace that this case is "remarkably similar to" *Bieter*. (Doc. # 280 at 4.) Lucky Palace retained a consultant to assist it in "secur[ing] a document signed by the Sheriff of Macon County authorizing [Lucky Palace] to operate bingo games in Macon County, Alabama." (Exs. 285 & 286 to Windom Dep.; Bracy Aff. ¶ 4.) The purpose for hiring Mr. Windom went to the core of Lucky Palace's formation, that is, to obtain a license for the operation of bingo in Macon County. (Compare Ex. 285 to Windom Dep. (The purpose of the consulting contract was "to secure a document signed by the Sheriff of Macon County authorizing Client to operate bingo games in Macon County, Alabama."), with Bracy Aff. ¶ 3 (Lucky Palace was "formed for the purpose of obtaining a license to operate bingo in Macon County, Alabama.").) As in *Bieter*, the purpose for which Mr. Windom was hired was the "*sine qua non* of the client's existence[,]" 16 F.3d at 934.

Also, similar to the situation in *Bieter*, Mr. Windom was "intimately involved" in efforts to achieve that "single objective." *Id.* at 938. As part of those efforts to secure a bingo license, Lucky Palace sought legal advice from various sources, including Bradley Arant Rose & White, and authorized Mr. Windom to communicate directly with Lucky Palace's attorneys in order to further Lucky Palace's objective to obtain a bingo license. (Bracy Aff. ¶ 9.) As is revealed by the documents sought to be protected, Mr. Windom was

[14] Hence, applying *Bieter*, Mr. Windom's status as an independent contractor, rather than as an employee of Lucky Palace (Exs. 285, 286 to Windom Dep.), does not automatically vitiate Lucky Palace's claim to the attorney-client privilege as to the attorney-client communications disclosed to Mr. Windom.

privy to and involved in those discussions. It is clear from a review of the emails, in particular those sent from attorneys with Bradley Arant Rose & White, that Mr. Windom was viewed as a representative of Lucky Palace, the same as Mr. Bracy and Mr. Ravich, for all matters pertaining to Lucky Palace's attempts to obtain a bingo license in Macon County. Mr. Windom refers to himself, Lucky Palace's attorneys, and its agents in the first person plural ("We" and "Our") (*see* email # 2), and other emails include specific discussions pertaining to pending litigation and litigation strategy (*see, e.g.,* emails # 6, 7, 8, 13, and 41). Moreover, many of the emails sought to be protected support Mr. Bracy's attestation that Mr. Windom's consulting work with Lucky Palace and its attorneys pertained to "matters critical to Lucky Palace's position in litigation." (Bracy Aff. ¶ 6.) Those emails, occurring pre- and post-litigation, reveal that Mr. Windom's behind-the-scenes involvement in the litigation and litigation strategy were sizeable.

The foregoing facets of Mr. Windom's and Lucky Palace's relationship make Mr. Windom the sort of individual with whom Lucky Palace's lawyers would wish to confer – and, in fact, did confer – in confidence in order to better understand Lucky Palace's reasons and motivations for obtaining counsel to represent and assist it in its efforts to obtain a bingo license in Macon County. *See Bieter*, 16 F.3d at 938. In other words, by virtue of Mr. Windom's relationship with Lucky Palace, the evidence establishes that Mr. Windom possessed important information not known to others, that, if communicated to Lucky Palace's attorneys, would assist them in providing more effective representation to Lucky

Palace in the pursuit of the common goal shared by Lucky Palace, its attorneys and Mr. Windom. This, finding, however, does not mean that the specific communications at issue automatically are privileged, because, as already noted, the *Bieter* doctrine is not an independent source of privilege, but rather applies to communications that already are protected by a privilege. Lucky Palace also must demonstrate, as in *Bieter*, that the communications satisfy the five-pronged test that *Bieter* adopted and borrowed from the corporate-employee context. *See Bieter*, 16 F.3d at 936, 938.

Generally, Defendants object to non-disclosure on the basis that, given Mr. Windom's consulting role, the communications flowing between Mr. Windom and Lucky Palace's agents and attorneys cannot be said to have been made for the purpose of seeking legal advice. They also argue that Lucky Palace has failed "to prove that it took effective steps to ensure that all participants were aware of the need to maintain confidentiality and to show that mechanisms were in place to accomplish that objective before the information was shared." (Doc. # 306 at 8-9.) Defendants did not specifically address the *Bieter* five-pronged test, instead asserting that *Bieter* was inapplicable altogether, but their objections nonetheless relate to the first, third and fifth requirements of the five-pronged *Bieter* test.[15]

[15] There is no serious objection to the second and fourth *Bieter* requirements. There is evidence that Mr. Windom worked closely with Lucky Palace's agents in the efforts to obtain a bingo license for Lucky Palace in Macon County and that Lucky Palace's attorneys authorized Mr. Windom to speak with its attorneys on such matters. (Bracy Aff. ¶¶ 5 & 9.) From this evidence, the court finds that it is reasonable to presume that Lucky Palace directed Mr. Windom's communications with Lucky Palace's attorneys, as mandated by *Bieter*'s second requirement. *See Bieter*, 16 F.3d at 939. As to the fourth *Bieter* requirement, the evidence supports a finding that Mr. Windom's responsibilities were coterminous with the reason for Lucky Palace's existence and with the scope of the matter that resulted in this litigation. *Id.*

Bieter defines the first requirement of what types of communications qualify as communications "made for the purpose of securing legal advice," *Bieter*, 16 F.3d at 936. That definition is broad: "[W]hen a matter is committed to a professional legal advisor, it is 'prima facie committed for the sake of legal advice and [is], therefore, within the privilege absent a clear showing to the contrary.'" *Id.* at 938 (quoting *Diversified Indus.*, 572 F.2d at 610). In *Bieter*, there was no clear showing to the contrary, *id.*, and in an affidavit counsel for Bieter represented that the withheld documents were "relate[d]" either to the lawsuit at issue or to Bieter's "related state court lawsuit." *Id.* Based upon that attestation, which the Eighth Circuit acknowledged was "not as strong a statement as one might like," and "the presumption that the communication was made for the purpose of seeking legal advice," *id.* at 938-39, it held that the communications were "made for the purpose of seeking legal advice," *id.* The third requirement – *i.e.*, that "the [corporation] made the request so that the corporation could secure legal advice," *id.* at 936 – is related to the first requirement, *see id.* at 939. "If the communication was made for the purpose of seeking legal advice and it was done at the direction of the superior, it is reasonable to infer that, absent evidence to the contrary, the superior directed that the communication be made for the purpose of securing legal advice." *Id.* The fifth requirement, which focuses on confidentiality, is satisfied when the communication is not "disseminated beyond those persons who, because of the structure of the client's operations, need to know its contents." *Id.*

In this subsection, the court turns first to consideration of *Bieter*'s first, third and fifth requirements and then to consideration of the common legal interest doctrine as applied to emails # 1, 6, 7, 8, 9, 10, 11, 12, 13, 15, 16, 17, 18, 19, 20, 21, 22, 23, 31, 32, 35 and 41 in order to address Defendants' specific objections. Each email has been examined individually.

To reiterate, *Bieter* concerned communications between the consultant and Bieter's attorneys; some of the communications were sent directly to the consultant, and as to others the consultant was copied, *see Bieter*, 16 F.3d at 934. Here, the foregoing twenty-two emails occurred between Mr. Windom (the consultant) and Lucky Palace's attorneys, either with or without disclosure to Lucky Palace's agents (Mr. Ravich and Mr. Bracy). Stated with generality to avoid comprising the privilege, these emails concern specific discussions about pending or anticipated litigation and/or litigation strategy and about actions, the legality of those actions, and legal opinions surrounding pre-litigation strategies in furtherance of Lucky Palace's goal of obtaining a bingo license in Macon County (emails # 1, 6, 7, 8, 9, 10, 11, 12, 13, 15, 16, 17, 18, 19, 20, 21, 22, 23, 31, 32, 35 and 41). Based upon a review of the emails, it is apparent that Mr. Windom, in his role as a consultant, had information relevant and necessary to aid Lucky Palace's attorneys in the representation of their client. The *in camera* review of the communications reveals that Mr. Windom's services were not "standard public relations services," *Haugh*, 2003 WL 21998674, at *3, but instead "were necessary so that [Lucky Palace's attorneys] could provide [Lucky Palace] with legal advice," *id.* In short, the

necessary showing has been made by Lucky Palace that Mr. Windom's participation in the communications, and the disclosure of documents and attorney-client communications to him, enabled Lucky Palace's attorneys to provide more effective representation to Lucky Palace than they could have without his participation and contribution.

On these facts, Lucky Palace has demonstrated that the matters communicated were "committed to a professional legal advisor." *Bieter*, 16 F.3d at 938. Accordingly, under *Bieter*, the communications were "'prima facie committed for the sake of legal advice[.]'" *Id.* (quoting *Diversified Indus.*, 572 F.2d at 610). Because no "'clear showing to the contrary'" has been made, *id.* (quoting *Diversified Indus.*, 572 F.2d at 610), the first *Bieter* requirement is present.

Moreover, because the first and second *Bieter* requirements have been demonstrated, *see supra* note 15, "it is reasonable to infer [for purposes of the third *Bieter* requirement] that, absent evidence to the contrary, the [corporation] directed that the communication be made for the purpose of securing legal advice." *Bieter*, 16 F.3d at 939. No evidence to the contrary has been presented; therefore, the third requirement is met.

As to Defendants' complaint that Lucky Palace has failed to prove that the communications were made in confidence (*i.e.*, *Bieter*'s fifth requirement), the email communications demonstrate the contrary. The affidavit from Mr. Bracy provides that Lucky Palace treated all communications with its attorneys as confidential and that the disclosure of those communications to Mr. Windom was not intended to be a waiver of the attorney-

client privilege. (Bracy Aff. ¶ 7.) The emails themselves note their confidential nature and indicate that no copies of any of the emails were forwarded or sent to any individual other than select representatives and agents of Lucky Palace and its attorneys. One email in particular contains a specific caution from a Bradley Arant attorney to Mr. Windom and Mr. Bracy not to disclose matters protected by the attorney-client privilege outside of the perceived protected group and confirms that Mr. Windom was intended to be part of the group for which the attorney-client privilege would extend. (Email # 3.) The court finds that the evidence is sufficient to demonstrate that no confidentiality concerns arise from the preparation and distribution of the documents for which the privilege is claimed. These facts are sufficient to establish the fifth *Bieter* requirement.

In sum, the same conclusion is warranted in this case as in *Bieter*. On this record, the attorney-client privilege applies to communications made between Mr. Windom and Lucky Palace's attorneys, and "the disclosure of otherwise privileged documents to [Mr. Windom] in the course of his confidential communications with counsel does not destroy the privilege. *Bieter*, 16 F.3d at 939-40. Mr. Windom was, "for purposes of the privilege, the functional equivalent of [Lucky Palace's] employee, and the communications in question fell within the scope of his duties, were made at the behest of his superior, and were made for the purpose of seeking legal advice for [Lucky Palace]." *Id.* at 940 (brackets added).

ii. *Seidman*

Lucky Palace also says that the common legal interest doctrine, as defined and applied in *Seidman* protects the communications at issue from disclosure.[16] (*See* Doc. # 280 at 11-12.) It says that Windom and Lucky Palace shared a "common legal interest" to "secure a document signed by the Sheriff of Macon County authorizing [Lucky Palace] to operate bingo games in Macon County, Alabama." (Doc. # 280 at 11.) Defendants, on the other hand, say that Lucky Palace has failed to show how "[Mr.] Windom's position as a political consultant to [it] is anything other than a business relationship." (Doc. # 306 at 8.)

No argument has been made that the interests between Mr. Windom and Lucky Palace are anything other than identical. The identical interests are revealed by the specific terms of the consulting contract and the nature of the relationship between Mr. Windom and Lucky Palace. The sole reason for Mr. Windom's representation of Lucky Palace, and as clearly recited in the contract, was to obtain a bingo license in Macon County for Lucky Palace, and the sole purpose for Lucky Palace's formation was to obtain a bingo license in Macon County. These parallel purposes make their interests essentially identical.

The objection by Defendants is that this interest is not legal. It is clear from *Seidman* that the legal interest need not involve the litigation at hand, *see* 492 F.3d at 816. Admittedly, however, all of the boundaries as to what constitutes a common *legal* interest,

[16] The parties have not cited, and the court is unaware, of any published Eleventh Circuit cases discussing the common legal interest doctrine, as defined in *Seidman*. Nor has any precedent been cited from this circuit that rejects the doctrine. The court finds *Seidman*'s analysis persuasive and applies it.

as opposed to a common *non-legal* interest, are not explored in *Seidman*. Defendants focus on the fact that Mr. Windom had a business relationship with Lucky Palace, which admittedly he did, but no argument has been made, and no authority cited, that a business relationship cannot be formed for the purpose of pursuing a common legal interest. In *Seidman*, the third-party law firm and Seidman were involved in a common quest to research and provide consistent advice to their joint clients concerning certain tax products. It was argued that the communication at issue did not involve a common legal interest because its purpose "was to coordinate the content of the message to their common clients," *id.* at 817. The Seventh Circuit, however, disagreed. It held that, because the "two joint venturers, [Seidman] and [the third-party law firm] undertook a consultation between their respective in-house counsel and [Seidman]'s outside counsel with respect to the legality of the proposed financial course of action they would recommend to their common clients," their "effort . . . was clearly within the scope of the common interest doctrine." *Id.*

Here, Mr. Windom and Lucky Palace contracted with each other for the purpose of joining forces in the pursuit of obtaining a bingo license for Lucky Palace. As is revealed by the email communications with Lucky Palace's attorneys, that joint venture comprised exploring the legal implications and obtaining professional legal advice with respect to the multifaceted course of action the joint venturers were undertaking to secure a bingo license for Lucky Palace in Macon County. That shared interest is not all that different from parties jointly developing patents: "[T]hey have a common legal interest in developing the patents

to obtain greatest protection and in exploiting the patents." *Baxter Travenol Labs., Inc. v. Abbott Labs.*, No. 84-C-5103, 1987 WL 12919, at *1 (N.D. Ill. June 19, 1987), cited in *Smithkline Beecham Corp. v. Apotex Corp.*, 193 F.R.D. 530, 539 (N.D. Ill. 2000), as an example of a common legal interest for purposes of the doctrine by the same name. On these facts, it is not difficult to conclude that the common interest is legal.[17]

Not only does the court find that there was a common legal interest, but after careful review of Windom's *ex parte* documents line by line, the court finds that the communications are "limited strictly to those communications made to further an ongoing enterprise," *Seidman*, 492 F.3d at 816, and the communications all relate to communications pertaining to the common strategy developed to achieve a single legal goal. The fact that not all of those communications were made in the throes of litigation (but some were) does not defeat application of the common legal interest doctrine. Accordingly, the court finds that Mr. Windom and Lucky Palace possess the requisite common legal interest for the attorney-client privilege to attach to communications between Mr. Windom and Lucky Palace's attorneys, and Defendants' argument that there is an inadequate showing of confidentiality has been addressed and rejected. These emails, therefore, are protected from disclosure under the attorney-client privilege's common legal interest doctrine. These emails are numbered as follows: # 1, 6, 7, 8, 9, 10, 11, 12, 13, 15, 16, 17, 18, 19, 20, 21, 22, 23, 31, 32, 35 and 41.

[17] By comparison, Sheriff Warren and Mr. McGregor did not share a common legal interest. (Doc. # 252 at 53 ("[O]ne party is the regulator, the other is the regulated; their interests could not be more legally adverse.").)

b. Emails # 2 and 3

Four of the emails at issue involve communications with Mr. Raby, two of which are emails # 2 and 3.[18] Mr. Raby was a recipient of emails # 2 and 3. Mr. Raby and Mr. Windom worked together as independent consultants on behalf of Lucky Palace, and Mr. Raby, alongside Mr. Windom, was a signatory on the consulting contract. (Exs. 285 & 286 to Windom Dep.) Mr. Raby's relationship with Lucky Palace and Mr. Windom is discussed in detail in Mr. Windom's deposition. (Doc. # 274.)

Lucky Palace claims the common legal interest doctrine as to emails # 2 and 3. It argues that Mr. Raby, as one of Lucky Palace's consultants, was part of the "client group for which the attorney-client privilege would extend" and that the communications in emails # 2 and 3 reveal that Mr. Raby "had information relevant and necessary to Lucky Palace's litigation strategy." (Doc. # 289 at 2-3.) Lucky Palace also points out that, as shown in email # 3, "the communications were intended to be treated as 'confidential[.]'" (Doc. # 289 at 2.) Defendants argue that "[d]isclosure to Raby, a third party, destroys any possible attorney-client privilege." (Doc. # 308 at 4.)

Initially, it is pointed out that Lucky Palace did not argue that *Bieter*'s theory also applied to Mr. Raby given his consulting relationship with Lucky Palace. (Doc. # 280 at 4-9.) *Bieter*'s applicability or not to Mr. Raby's and Lucky Palace's relationship, thus, will not be addressed. Nonetheless, for the reasons set out in the preceding subsection, the court finds

[18] The other two emails – # 46 and # 47 – are discussed below, in the section addressing the work-product doctrine.

that the communications in emails # 2 and 3 are protected by the common legal interest doctrine. By virtue of the consulting contract (Exs. 285 & 286 to Windom Dep.) and the evidence with respect to Mr. Raby's consulting involvement (*see generally* Windom Dep.), Mr. Raby's interest is exactly the same as Mr. Windom's and, thus, the interest is legal, and that legal interest is shared with Lucky Palace. Moreover, the communications received by Mr. Raby are directly related to the subject of the common legal interest and contain litigation strategy.

c. Emails # 33, 40, 43, 44 and 45

Five of the emails for which the privilege is claimed stand in a slightly different posture than the others because they involve communications solely between Mr. Windom and Lucky Palace's president, Mr. Bracy. (Emails # 33, 40, 43, 44 & 45.) As to email # 33, Lucky Palace contends that it has demonstrated that Mr. Windom, as Lucky Palace's independent consultant, was a "representative" of Lucky Palace and that, therefore, these "communications between [Mr.] Windom and the [p]resident of Lucky Palace concerning litigation [are] privileged under federal common law." (Doc. # 289 at 13.) The basis for Lucky Palace's claim of attorney-client privilege based upon Mr. Windom's "representative" status is steeped in Supreme Court Standard 503(b), in particular its admonition that the privilege extends to certain communications "between the client and a representative of the client." (Doc. # 280 at 2; Doc. # 289 at 12.) As to emails # 40, 43, 44 and 45, Lucky Palace contends that, during the time frame these emails were sent – December 28, 2006 to June 14,

2007 – Mr. Windom had an "undisputed affiliation" with Lucky Palace because he was an "investor"/"shareholder" in Lucky Palace and that this affiliation gives rise to the type of relationship to which the attorney-client privilege can attach. (Doc. # 289 at 15; Doc. # 280 at 1.)

Defendants, however, say that Standard 503(b) is not "authoritative" because it was not enacted by Congress (*see*, *e.g.*, Doc. # 308 at 19), but that, in any event "[Mr.] Windom's services were not services necessary to the legal representation of [Lucky Palace]" (Doc. # 308 at 2). As to emails # 40, 43, 44 and 45, Defendants contend that Lucky Palace's argument that Mr. Windom's investor status justifies non-disclosure of any communications made during that time period is too conclusory to be adopted and is not supported by "sufficient authority." (Doc. # 308 at 22.)

The pertinent portion of Standard 503 provides that "[a] client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client . . . (4) *between representatives of the client or between the client and a representative of the client*[.]" Supreme Court Standard 503(b) (emphasis added), cited in *Bieter*, 16 F.3d at 935. Both *Bieter*, *supra*, and *Seidman*, *supra*, considered Standard 503(b) persuasive, even though not enacted, and the court likewise is persuaded that, contrary to Defendants' assertion, Standard 503(b) should not be discarded. *See Bieter*, 16 F.3d at 935 (finding Supreme Court Standard 503(b) "useful" even though it was never enacted, and observing that "'courts have

relied upon it as an accurate definition of the federal common law of attorney-client privilege'" (citation omitted)); *see also Seidman*, 492 F.3d at 814-15 (observing that Standard 503 "has been recognized 'as a source of general guidance regarding federal common law principles'").

The court already has determined that the consulting relationship between Mr. Windom and Lucky Palace qualifies Mr. Windom as Lucky Palace's representative; Lucky Palace expressly contracted with Windom to provide expertise and assistance in its legal goal of obtaining a bingo license in Macon County. Also, Mr. Bracy, as Lucky Palace's president, is the "client." Accordingly, the court finds that the communications at issue (emails # 33, 40, 43, 44 and 45) are between the client and a representative of the client, within the meaning of Supreme Court Standard 503(b).

Furthermore, upon careful review of emails # 33, 40, 43, 44 and 45, the court finds that the communications were made for the purpose of facilitating the rendition of professional legal services to Lucky Palace. The communications were germane and directly related to the purpose for which Lucky Palace's attorneys were retained. The content of those emails, among other things, includes an analysis of the present litigation and discussion of the present posture of the action. Moreover, emails # 40, 43, 44 and 45[19] occurred after Lucky Palace filed this lawsuit and explicitly address this litigation and include specifics as to strategy.

[19] In the *in camera* submission, emails # 44 and 45 are the same document. If the duplication is an error, Lucky Palace may move to correct the *in camera* filing.

With that said, it is acknowledged that the line when Mr. Windom ceased representing Lucky Palace as a consultant/"representative" is hazy. The terms of the contract do not include an express termination date, but indicate that the contract's viability extended until at least December 31, 2007. Mr. Windom's testimony that he did not work as a consultant during the time that he was an investor – which was approximately late September 2006 to June 2007 – however, blurs that contractual timeline. (Windom Dep. 16, 47.) In the end, it is not necessary to clarify the temporal scope of the independent consulting arrangement or to resolve definitely whether Lucky Palace has proven that, standing alone, Mr. Windom's investor status precludes disclosure of communications made during that time period. Rather, focusing on the nature of the relationship between Mr. Windom and Lucky Palace and the services he provided, in light of the totality of the evidentiary record, the court finds that Mr. Windom acted in a "representative" capacity for Lucky Palace and shared a common legal interest with it, discussed *supra*, so as to protect the communications at issue from disclosure during the time frame that the emails were dispersed.

d. Email # 42

Lucky Palace says that the attorney-client privilege, and in particular, the common legal interest doctrine and presumably *Bieter*, extend to protect communications between Mr. Windom and Bob Spotswood ("Spotswood"), an attorney for Lucky Palace's co-Plaintiffs (the Charities). (Doc. # 289 at 15.) This argument pertains to email # 42, dated March 21,

2007, from Mr. Spotswood to Mr. Windom and Mr. Bracy, and includes attachments, as described on the privilege log.

Bieter did not speak to the factual scenario of communications between a client's independent consultant and an attorney representing, not the client, but the client's co-plaintiff; it addressed when communications between a client's independent consultant and that client's attorney are protected by the attorney-client privilege, *see* 16 F.3d at 934. Lucky Palace has not distinguished communications between Mr. Windom and Lucky Palace's attorneys from communications between Mr. Windom and attorneys for Lucky Palace's co-Plaintiffs. (Doc. # 280 at 9-11.) Absent any argument or authority from Lucky Palace that supports an extension of *Bieter* to communications between Mr. Windom and Mr. Spotswood, the court will not effect an extension on its own.

The court, however, agrees with Lucky Palace that the communications in email # 42 fit within the parameters of *Seidman*'s common legal interest doctrine. There can be no serious dispute that Lucky Palace's and the Charities' legal interests are identically aligned. Lucky Palace desires to open a facility in Macon County for the operation of bingo operations, and the Charities desire to conduct bingo at that proposed facility and have contracted with Lucky Palace to do so. Neither can attain their goal unless Lucky Palace obtains an electronic bingo license from Sheriff Warren. The attainment of this ultimate goal also is what drove Mr. Windom's consulting work. Moreover, the email at issue addresses

this area of common legal interest. Thus, email # 42 is protected by the attorney-client privilege.

2. Work-Product Doctrine

Lucky Palace claims that the work-product doctrine protects from disclosure seven communications. (Emails # 9, 10, 11, 21, 33, 46 & 47.[20]) Emails # 9, 10 and 11, each dated May 4, 2006, were sent from a Bradley Arant attorney to Mr. Windom and Mr. Bracy, with email # 11 including other Bradley Arant attorneys as additional recipients. Email # 21, dated May 22, 2006, was sent from a Bradley Arant attorney to Mr. Windom, Mr. Bracy and three other Bradley Arant attorneys. Email # 33, dated June 16, 2006, was sent from Mr. Bracy to Mr. Windom. Email # 46, dated August 28, 2007, was sent from Dwight Washington ("Washington"), an investor with Lucky Palace, to Mr. Windom, Mr. Raby and individuals associated with "the development and operations of Lucky Palace as well as Lucky Palace investors," and Mr. Bracy was copied on the email. (Doc. # 289 at 17.) Email # 47 is from Mr. Raby to Mr. Windom.

In response to each claim of work product, Defendants respond that they "are unable to determine whose work product forms the basis for [the] claim of privilege." (Doc. # 308 at 8; *see also* Doc. # 308 at 15 & 24.) However, to refute any potential argument by Lucky Palace that the communications are the work product of Mr. Windom, Defendants point out that "[Mr.] Windom has unequivocally testified that he did not act as an attorney for [Lucky

[20] The court already has determined that emails # 9, 10, 11, 21 and 33 are protected by the attorney-client privilege.

Palace]." (Doc. # 308 at 8.) "As such, none of [Mr.] Windom's work product would be subject to the attorney work product privilege." (Doc. # 308 at 8.) Defendants also assert that, if Lucky Palace contends that the communications at issue are the work product of Bradley Arant attorneys, then disclosure to Mr. Windom (emails # 9, 10, 11, 21 and 46) destroys that privilege. As to Mr. Raby's inclusion (email # 47), Defendants assert that any work product disclosed to him destroys the privilege because he is a "third party." (Doc. # 308 at 25.)

a. Emails # 9, 10, 11 and 21

While emails # 9, 10 and 11 were prepared by one of Bradley Arant's attorneys (*i.e.*, by an attorney of the party from whom discovery is sought), it is, in the court's view, a close call as to whether Lucky Palace's attorneys prepared these three communications in anticipation of litigation. Given that the court already has found that these communications are protected by the attorney-client privilege, it is unnecessary to make that call and, thus, the court declines to do so. It is not a close call as to email # 21; this email was prepared by an attorney for Lucky Palace, and it clearly was prepared in anticipation of litigation.

b. Emails # 33 and 47

Turning to emails # 33 and 47, Defendants' argument that, to be protected, the work product must have been prepared by an attorney for Lucky Palace is foreclosed by Rule 26(b)(3), which protects documents "prepared in anticipation of litigation or for trial by or for another party or its representative (including the other party's attorney, consultant, surety,

indemnitor, insurer, or agent)." Fed. R. Civ. P. 26(b)(3); *see also In re Grand Jury Proceedings*, 601 F.2d at 171 (Work-product doctrine "protects material prepared by *agents* for the attorney." (emphasis added)).[21]

Mr. Windom, as Lucky Palace's consultant, is Lucky Palace's representative (as explained earlier in this opinion), and Mr. Bracy is Lucky Palace's president. Emails # 33 and 47, thus, contain communications between an "agent" of Lucky Palace (*i.e.*, Mr. Bracy) and Lucky Palace's "consultant"/"agent" (*i.e.*, Mr. Windom). The parties to the communication are those expressly contemplated by Rule 26(b)(3) and case authority. Accordingly, the nature of Mr. Windom's and Mr. Bracy's relationship to Lucky Palace make them individuals to whom the work-product doctrine can apply. Here, the doctrine applies because the email strings in emails # 33 and 47 expressly were prepared in anticipation of litigation.

c. Email # 46

Email # 46, sent after the commencement of this lawsuit, qualifies as a document prepared for trial. It was authored by a Lucky Palace investor. The content of the email reveals that Mr. Washington, by virtue of his relationship with Lucky Palace, had access to and conveyed information to facilitate completion of litigation-related matters. Under the

[21] *See also United States v. Nobles*, 422 U.S. 225, 238 (1975) ("[T]he [work product] doctrine is an intensely practical one, grounded in the realities of litigation in our adversary system. One of those realities is that attorneys often must rely on the assistance of investigators and other agents in the compilation of materials in preparation for trial. It is therefore necessary that the doctrine protect material prepared by agents for the attorney as well as those prepared by the attorney himself.").

circumstances presented, the court finds that he appropriately is considered an "agent" of Lucky Palace. Fed. R. Civ. P. 26(b)(3). The attachment was authored by Mr. Bracy. The email and the attachment were prepared in anticipation of trial, and it is clear that this document is one intended to be protected from disclosure to opposing counsel.

d. Substantial Need and Undue Hardship

Lucky Palace has demonstrated that emails # 21, 33, 46 and 47 are work product. To warrant disclosure, Defendants must show that they have "substantial need of the materials . . . and that [Defendants are] unable without undue hardship to obtain the substantial equivalent of the materials by other means." Fed. R. Civ. P. 26(b)(3). Defendants have made no showing to this court that they have substantial need for disclosure of these communications or that they will suffer undue hardship from the absence of disclosure. *See Castle*, 744 F.2d at 1467. These email communications, thus, are protected and need not be disclosed.[22]

III. CONCLUSION

For the foregoing reasons, it is ORDERED that VictoryLand's Motion to Compel Production of Documents (Doc. # 236) is DENIED as moot as to the documents on Windom's privilege log numbered 4, 5, 14, 24, 25, 26, 27, 28, 29, 30, 34, 36, 37, 38 and 39,

[22] In its *in camera* brief, Lucky Palace has raised, without elaboration, the "joint defense privilege" as to six communications. It, however, did not provide any authority in support of its reliance on the joint defense privilege. The privilege more commonly is raised in criminal cases. *See, e.g., United States v. Almeida*, 341 F.3d 1318, 1323 (11th Cir. 2003) ("When co-defendants enter into a joint defense agreement, by contrast, each defendant retains his own attorney . . . . [C]onfidential communications made during joint defense strategy sessions are privileged."). Given the court's findings herein, it is not necessary to address Lucky Palace's reliance on a "joint defense privilege."

because the claim of privilege has been withdrawn and the documents produced. The motion otherwise is DENIED.

DONE this 21st day of April 2009.

/s/ W. Keith Watkins
UNITED STATES DISTRICT JUDGE