

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

Civil Action No. 16-cv-02754-WYD-NYW

KIRSTIN KURLANDER, on behalf of herself and others similarly situated,

Plaintiff,

v.

KROENKE ARENA COMPANY, LLC,

Defendant.

ORDER

Magistrate Judge Nina Y. Wang

This matter comes before the court on the Motion for Protective Order and to Quash Subpoena Duces Tecum (“Motion for Protective Order”) [#26], filed by Defendant Kroenke Arena Company, LLC (“KAC” or “Defendant”) on May 22, 2017. The Motion for Protective Order was referred to this Magistrate Judge pursuant to 28 U.S.C. § 636(b)(1), the Order Referring Case dated November 22, 2016 [#4], and the Memorandum dated May 23, 2017 [#29]. The court has considered the Parties’ filings [#26, #27, #28, #30, #36], the applicable case law, and the comments offered during oral argument held July 11, 2017. The matter is now ripe for resolution, and, for the reasons set forth herein, this court hereby **DENIES** the Motion for Protective Order.

BACKGROUND

On November 10, 2016, Plaintiff Kirstin Kurlander (“Plaintiff” or “Ms. Kurlander”) initiated a Class Action Complaint against Kroenke Sports and Entertainment, LLC, alleging that the entity’s failure to provide audio content captioning during events held at the Pepsi Center, and failure to otherwise provide effective communication for patrons who are deaf or hard of hearing, amounts to violations of Title III of the Americans with Disabilities Act (“ADA”) and the Colorado Anti-Discrimination Act (“CADA”). [#1]. Ms. Kurlander amended the Complaint on January 13, 2017 to substitute KAC for the original defendant, [#7], and again on March 20, 2017, to eliminate the claim arising under CADA. [#14].

On January 25, 2017, this court entered a Scheduling Order in this matter, [#12], and the Parties proceeded through discovery. On May 9, 2017, the Parties filed a Joint Status Report and contacted the undersigned Magistrate Judge’s chambers with regard to the circumstances that precipitated the Motion for Protective Order. *See* [#23]. The following facts are drawn from the Parties’ Joint Written Discovery Dispute Chart submitted directly to chambers and the briefing associated with KAC’s Motion for Protective Order.

Previously in this action, Plaintiff filed a Motion for Class Certification and attached the declarations of five putative class members thereto. *See* [#15]. In response, Defendant argued that “five patrons ... cannot justify class certification.” [#18 at 14]. As part of the litigation, KAC retained Kari Knutson¹ as a non-testifying expert “to advise Defendant and its counsel on

¹ Generally, the identity of a non-testifying expert is outside the bounds of discovery, unless there has been a showing of exceptional circumstances. *Ager v. Jane C. Stormont Hosp. & Training Sch. for Nurses*, 622 F.2d 496, 503 (10th Cir. 1980). However, in this case, the identity of the non-testifying expert was voluntarily disclosed to Plaintiff and her counsel by a putative class member, who, as discussed in detail below, was under no confidentiality obligation to Defendant or the non-testifying expert.

Deaf culture and provide opinions on the same,”² regarding services available at the Pepsi Center. [#26 at 1]. Counsel for KAC drafted questions for Ms. Knutson to use during interviews with members of the Deaf community (“Survey Questions”). [*Id.* at 12]. Counsel also drafted introductory remarks to be used with the interviews (“Script”). [*Id.* at 1]. Counsel for KAC authorized the non-testifying expert to conduct such interviews over Skype, FaceTime or relay, “with the work product drafted by [KAC’s] counsel to be her script.” [*Id.* at 2]. Although counsel for KAC did not authorize Ms. Knutson to use electronic mail to conduct the interviews, Ms. Knutson nonetheless contacted four individuals in writing and sent three of the four the Survey Questions inquiring into their views on the modes of communication offered at the Pepsi Center. Two of these individuals (collectively, “Declarants”) had already submitted declarations in support of Plaintiff’s Motion for Class Certification, and did not substantively respond to Ms. Knutson’s communication. Two other individuals (“Putative Class Members”) responded to the Survey Questions in writing. The substance of the email correspondence with each of the individuals is different, but three of the four emails contain the Script.

Plaintiff learned of KAC’s non-testifying expert and the emails, including the Script, because one of the Declarants, Jaclyn Tyrcha, voluntarily forwarded her chain of email communication with the non-testifying expert to Plaintiff’s counsel. That communication identified Ms. Knutson as Defendant’s non-testifying expert and included the Script. The Parties met and conferred and agreed to exchange copies of the electronic correspondence, subject to an

² KAC uses the capitalized “Deaf,” presumably to refer to a community of individuals who cannot hear even with assistive devices and who so self-identify, as opposed to the lower-case “deaf,” which this court understands operates as an adjective to describe only the physical attributes of individuals who cannot hear even with assistive devices, and these individuals do not necessarily self-identify as “Deaf.” The court endeavors to apply the term throughout this Order in a manner consistent with how the Parties used the term during the informal discovery dispute conference, mindful of the Parties’ stated explanation of the difference between the two terms. Any error by the court in doing so is unintended.

agreement that neither Party was conceding either discoverability or admissibility. Following the exchange of electronic correspondence, Plaintiff's counsel contacted the Putative Class Members who had responded to Ms. Knutson and asked that they forward their responses to her. The Putative Class Members then forwarded their answers to the Survey Questions to Plaintiff's counsel. *See* [#30 at 4].

On May 16, 2017, the Parties appeared before this court for an informal discovery dispute conference regarding this issue, and submitted the electronic correspondence for the court's *in camera* review. [#24]. The following questions were presented: (1) are the emails protected as work product under Rule 26(b)(3); (2) if so, did disclosure of the emails to putative class members result in waiver of the privilege; (3) are the emails protected as work of the non-testifying expert under Rule 26(b)(4)(D); (4) if so, did the non-testifying expert's correspondence with putative class members result in waiver of Rule 26(b)(4)(D) protection; and (5) regardless of whether at one time the emails enjoyed protection as either work product or under Rule 26(b)(4)(D), has Plaintiff shown substantial need or exceptional circumstances necessary to justify disclosure of the emails. Having considered the Parties' briefing and the applicable case law, this court finds that no work product privilege attached to the Script or the emails. The court further finds that even if work product protection attached, Defendant expressly waived it with regard to the Script. In addition, this court finds that neither the work product doctrine nor Rule 26(b)(4)(D) protects Ms. Tyrcha's voluntary disclosure to Plaintiff's counsel of the identity of Ms. Knutson as Defendant's non-testifying expert, or the substance of the communication between Ms. Knutson and the two Declarants. As to the identities of the third parties whom Ms. Knutson contacted and the substance of the communication exchanged with the Putative Class Members that was revealed only through operation of the agreement between counsel, I find that

such information is covered by Rule 26(b)(4)(D), but that Plaintiff has carried her heavy burden of showing exceptional circumstances exist to warrant disclosure. *See* Fed. R. Civ. P. 26(b)(4)(D)(ii).

At oral argument, the Parties identified three categories of information contained in the electronic correspondence at issue: (1) the Survey Questions; (2) the third parties' responses to the Survey Questions; and (3) other communications between Ms. Knutson and the third parties. While the court finds this categorization helpful, the undersigned also considers the specifics of the correspondence exchanged between Ms. Knutson and the four individuals with whom she communicated.

LEGAL STANDARDS

I. Work Product Doctrine

Defendant first argues that the work product doctrine covers not only the Survey Questions crafted by its counsel but also the entirety of the electronic correspondence exchanged between Ms. Knutson and the third parties. The work product doctrine is reflected in Fed. R. Civ. P. 26(b)(3)(A), which generally protects “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).” The Rule provides that, subject to Rule 26(b)(4), work product may be discovered if it is otherwise discoverable under Rule 26(b)(1) and the party seeking the disclosure establishes “substantial need.” Fed. R. Civ. P. 26(b)(3)(A)(i),(ii).

Protection under the work product doctrine is not absolute, and it can be waived. A waiver may be express, i.e., a party affirmatively consents to disclosure of the information. *See, e.g., Grace United Methodist Church v. City of Cheyenne*, 451 F.3d 643, 668 (10th Cir. 2006)

(“The work-product privilege may be waived by the voluntary release of materials otherwise protected by it.”) (citation and quotation omitted). Or waiver may be implied through conduct. The burden of proving waiver rests upon the party seeking to overcome the privilege. *DH. ex rel. Holder v. Gold Fields Mining Corp.*, 239 F.R.D. 652, 655 (N.D. Okla. 2005) (“[T]he majority view is that the party claiming waiver has the burden of proof on that issue.”).

II. Rule 26(b)(4)(D)

A separate Rule governs the work of non-testifying experts and provides that:

[o]rdinarily, a party may not, by interrogatories or deposition, discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or to prepare for trial and who is not expected to be called as a witness at trial.

Fed. R. Civ. P. 26(b)(4)(D).³ Exceptions to the Rule include (1) such discovery as provided for in Rule 35(b), which pertains to the report of an examiner who is performing a mental or physical exam pursuant to court order; and (2) when the party seeking the discovery demonstrates “exceptional circumstances under which it is impracticable for the party to obtain facts or opinions on the same subject by other means.” *Id.* at 26(b)(4)(D)(i),(ii). Four commonly identified purposes for Rule 26(b)(4)(D) include:

- (1) Allowing counsel to obtain the expert advice they need in order to properly evaluate and present their client’s position, without fear that every consultation “may yield grist for the adversary’s mill”;
- (2) Preventing unfairness that stems from allowing one party to benefit from the effort and expense incurred by its adversary in preparing its case;
- (3) Guarding against the diminished willingness of experts to serve as consultants, and any potential unfairness to the expert; and

³ Prior to the 2010 Amendments to the Federal Rules of Civil Procedure, Rule 26(b)(4)(D) was codified at Rule 26(b)(4)(B). The substance of the Rule did not change with the 2010 Amendments, and therefore, the court incorporates case law, and treatises, interpreting Rule 26(b)(4)(B) into this Order. *See e.g.*, 8A CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE & PROCEDURE CIVIL § 3032 (3d ed. 2015).

(4) Preventing the prejudice associated with one party calling an expert previously retained or consulted by the other side.

Rubel v. Eli Lilly & Co., 160 F.R.D. 458, 460 (S.D.N.Y. 1995). *See also Durflinger v. Artiles*, 727 F.2d 888, 891 (10th Cir. 1984) (identifying the promotion of fairness as a guiding purpose of the Rule). *Brigham Young Univ. v. Pfizer, Inc.*, No. 2:12-MC-143 TS BCW, 2012 WL 1029304, at *4 (D. Utah Mar. 26, 2012) (noting that Rule 26(b)(4)(D) acts as a shield permitting parties to prepare for trial).

KAC carries the burden of establishing whether the Rule applies. *See Johnson v. Gmeinder*, 191 F.R.D 638, 643 (D. Kan. 2000) (party invoking the protection of Rule 26(b)(4)(B) has the burden of establishing that the Rule applies). If the electronic correspondence is protected under the Rule, the burden shifts to Ms. Kurlander to show exceptional circumstances warranting disclosure. *Martensen v. Koch*, 301 F.R.D. 562, 580 (D. Colo. 2014). A party seeking discovery from a non-testifying expert cannot rely on conclusory statements or leave to the court the task of ascertaining exceptional circumstances. *Id.*

ANALYSIS

I. Work Product Protection

The court first considers whether the electronic correspondence between Ms. Knutson and the third parties is work product under Rule 26(b)(3)(A). KAC argues that it is, because “(i) the script and the questions drafted by undersigned counsel for the consultant’s use constitute attorney mental impressions, (ii) other statements by the consultant relating to the lawsuit in the electronic mails involve opinions held by the consultant, and (iii) the answers to the questions constitute facts discovered (known) by the consultant.” [#26 at 4]. Plaintiff contends that the Survey Questions are not protected, because Ms. Tyrcha voluntarily forwarded them to

Plaintiff's counsel and Ms. Tyrcha was under no obligation to protect the confidentiality of the correspondence she exchanged with Ms. Knutson. [#30 at 6]. In assessing the Parties' arguments, this court considers the electronic correspondence both holistically and for its component parts.

Survey Questions and Script. To the extent the Survey Questions and Script reflect the mental impressions of Defense counsel and therefore constitute work product, Defendant expressly waived any protection afforded them when its counsel instructed Ms. Knutson to use them to interview third parties. There is no dispute that Defendant intended for Ms. Knutson to pose the Survey Questions to third parties, who were under no obligation of confidentiality to Defendant. Such being the case, neither the Script nor the Survey Questions, whether used in writing or orally, are protected by the work product doctrine. Indeed, had Ms. Knutson strictly followed her instructions regarding how she should communicate with third parties, the Survey Questions and Script would not have been protected under the plain language of Rule 26(b)(3)(A), which precludes discovery only of “*documents and tangible things* that are prepared in anticipation of litigation or for trial.” Fed. R. Civ. P. 26(b)(3)(A) (emphasis added). Once Plaintiff became aware of the correspondence between Ms. Knutson and Ms. Tyrcha, whatever the form, Plaintiff could inquire as to the questions Ms. Knutson posed and any responses thereto. This court finds no basis for cloaking the Survey Questions or Script in work product protection simply because Ms. Knutson wrote rather than spoke them.⁴

Electronic correspondence from Ms. Knutson. The court's holding that the Survey Questions and Script are not protected by the work product doctrine does not necessarily extend

⁴ At oral argument, Defense counsel appeared to concede that the Survey Questions, which she expected Ms. Knutson to pose orally to third parties under no obligation of confidentiality, could not constitute work product.

to the entirety of the electronic correspondence exchanged between Ms. Knutson and the third parties.⁵ Indeed, work product can contain information that is not protected in and of itself. However, the language of Rule 26(b)(3) is again instructive. As mentioned above, Rule 26(b)(3)(A) defines work product as “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)(A). As an initial matter, Defense counsel did not author the emails, and the emails do not constitute correspondence exchanged between Defense counsel and Ms. Knutson in preparation for trial. Indeed, Defense counsel represents that she did not authorize Ms. Knutson to use written correspondence. As to the question of whether the electronic correspondence constitutes Ms. Knutson’s work product generated in her role as a non-testifying expert for KAC, e.g., a “consultant” as identified by Rule 26(b)(3), the correspondence does not appear to fit cleanly within the rubric of the Rule. The correspondence did not surface, for example, as an attachment to a report Ms. Knutson sent to Defense counsel communicating her progress. Rather, the correspondence reflects Ms. Knutson’s work aimed at gathering information in support of her consulting engagement. This court finds that, rather than viewing the electronic correspondence within the contours of the work product doctrine, the more appropriate source of potential protection for the correspondence derives from Rule 26(b)(4)(D), which applies directly to non-testifying experts.

Responses to Survey Questions. The third-party responses to the Survey Questions similarly do not constitute attorney or non-testifying expert work product. KAC and the third

⁵ The court notes that it is not entirely clear which section of the Script Defense counsel is responsible for preparing, and which section reflects language added by Ms. Knutson based on her own opinions or characterizations of the lawsuit. However, the court assumes that language other than what Defense counsel drafted appears in Ms. Knutson’s emails to the third parties.

parties have no relationship, such as those identified in Rule 26(b)(3), that justifies the extension of the work product doctrine to the survey responses. Additionally, the responses to the Survey Questions are not the work of Ms. Knutson. The third parties did not prepare their responses on behalf of Defendant in anticipation of litigation or trial. Rather, they responded to non-confidential questions posed by Defendant's non-testifying expert. Even Ms. Knutson's own statements regarding confidentiality, which vary between the different email chains, are ambiguous at best about how long the third parties' responses would remain confidential.⁶ *Procter & Gamble Co. v. Haugen*, 183 F.R.D. 571, 575 (D. Utah 1998) (observing that parties should take reasonable steps to protect work product from disclosure). In addition, wholly apart from what Ms. Knutson intended, none of the third parties agreed to confidentiality with respect to the responses, or requested that Defendant or Ms. Knutson maintain confidentiality of the responses. *See Aull v. Cavalcade Pension Plan*, 185 F.R.D. 618, 624 (D. Colo. 1998) (observing that to be protected by the work product doctrine, a document must be prepared in anticipation of litigation and with the intention that it remain confidential) (citing *RTC v. Heiserman*, 151 F.R.D. 367, 373 (D. Colo. 1993)). Defendant cites no cases, and this court could find none, that suggest a party can claim work product protection over communication authored by third parties with whom it has no relationship. All of these factors lead this court to conclude that the third parties' survey responses are not attorney work product under Rule 26(b)(3). To the extent that correspondence authored by the third parties could constitute facts held by the non-testifying

⁶ With respect to the Declarants, Ms. Knutson stated that she is engaged in "confidential consulting," but she never indicated that she expects that the Declarants will maintain either the questions or their responses as confidential. With respect to the Putative Class Members, she indicated that her work is confidential, but stated "you can't tell anyone about this case until it goes to court," which is misplaced given the fact that this case is already "in court." [#28; #43-1].

expert, this court again finds that the issue is more appropriately considered under Rule 26(b)(4)(D).

Other Correspondence with Third Parties. The emails also contain correspondence between Ms. Knutson and third parties involving matters unrelated to this litigation. While disputable that the correspondence is relevant to the claims and defenses of this action, it is not disputable that correspondence exchanged for a purpose other than the preparation for litigation or trial simply cannot be protected from disclosure by the work product doctrine.

For these reasons, this court finds that the electronic correspondence at issue does not constitute work product under Rule 26(b)(3).

II. Non-Testifying Expert Protections

The court now turns to whether the electronic correspondence is protected under Rule 26(b)(4)(D) as “facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or to prepare for trial and who is not expected to be called as a witness at trial.” Defendant argues that the protections provided under Rule 26(b)(4)(D) are separate from those available under Rule 26(b)(3), and are not subject to waiver. [#26 at 9]. Defendant further argues that if waiver occurred, it is limited in nature and cannot extend to the correspondence that its counsel voluntarily disclosed in the context of the discovery dispute. [*Id.*; #36 at 5]. Plaintiff argues that the Survey Questions and responses are not protected by the non-testifying expert “privilege,” because the correspondence between Defendant and the Putative Class Members is factual in nature and was not kept confidential. [#30 at 6]. Plaintiff further contends that even if Ms. Knutson’s work is protected by Rule

26(b)(4)(D), Plaintiff has established exceptional circumstances to warrant the discovery of the four sets of electronic correspondence in question.⁷

A. Comparison with Work Product

As an initial matter, this court notes that the express language of Rule 26(b)(3) and the history of Rule 26(b)(4)(D) instruct that the protection available under Rule 26(b)(4)(D) is not coextensive with, but rather distinct from, the work product doctrine. Fed. R. Civ. P. 26(b)(3)(A); Advisory Comm. Notes to the 1970 Amendments Rule 26(b)(4)(B) (“These new provisions of subdivision (b)(4) repudiate the few decisions that have held an expert’s information privileged simply because of his status as an expert They also reject as ill-considered the decisions which have sought to bring expert information within the work-product doctrine.”). *See also Martensen*, 301 F.R.D. at 580 (discussing the protections under Rule 26(b)(4)(D) and Rule 26(b)(3) separately). *See also Genesco, Inc. v. Visa U.S.A., Inc.*, 302 F.R.D. 168, 189 (M.D. Tenn. 2014) (citing *In re PolyMedica Corp. Sec. Litig.*, 235 F.R.D. 28, 30 (D. Mass. 2006) (observing that the “‘non-testifying expert’ privilege is distinct from the work-product doctrine and the attorney-client privilege)); *Precision of New Hampton, Inc. v. Tri Component Prod. Corp.*, No. C12-2020, 2013 WL 2444047, at *4 (N.D. Iowa June 5, 2013) (observing that “courts disagree over the relationship between Federal Rule Civil Procedure 26(b)(4)(D) and the work product doctrine,” but finding that the two are separate). *But see Appleton Papers, Inc. v. E.P.A.*, 702 F.3d 1018, 1024 (7th Cir. 2012) (observing that Rule 26(b)(4)(D) is simply an application of the work product rule). Accordingly, the court’s

⁷ At oral argument, Plaintiff’s counsel confirmed that she seeks only the electronic correspondence herein at issue, and would not seek to obtain Ms. Knutson’s file or to depose Ms. Knutson.

determination that the electronic correspondence does not qualify as work product under Rule 26(b)(3) does not necessarily preclude protection under Rule 26(b)(4)(D).

B. Applicability in this Action

This court begins its analysis of the application of Rule 26(b)(4)(D) by considering the plain language of the Rule:

[o]rdinarily, a party may not, by interrogatories or deposition, discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or to prepare for trial and who is not expected to be called as a witness at trial.

There is no real dispute between the Parties that Defendant retained Ms. Knutson as a non-testifying expert for the purposes of this litigation. Nor is there any real dispute that the electronic correspondence between Ms. Knutson and the third parties reflects facts or opinions known and gathered by her in the course of her work as a non-testifying expert. This court thus concludes that the electronic correspondence falls squarely within Rule 26(b)(4)(D).

Having found that the correspondence is subject to protection as facts and opinions known to a non-testifying expert, the court next considers whether discovery of the correspondence is nonetheless permitted. The particular circumstances of disclosure are salient. First, the court finds that Rule 26(b)(4)(D) is inapplicable to the correspondence between Ms. Knutson and Ms. Tyrcha because Ms. Tyrcha gave the correspondence directly to Plaintiff's counsel, as opposed to Plaintiff obtaining the correspondence through discovery directed at Defendant or Ms. Knutson. Presumably, albeit not entirely clear, the second Declarant, Justin Buckhold, also voluntarily disclosed to Plaintiff the correspondence exchanged between him and Ms. Knutson.⁸ No provision of Rule 26(b)(4)(D) bars a third party, who is under no obligation

⁸ To the extent Mr. Buckhold did not directly disclose his correspondence to Plaintiff's counsel, the court concludes that his identity was discernible both through Ms. Tyrcha and the email

of confidentiality to Defendant or Defendant's non-testifying expert, from providing her or his correspondence to Plaintiff. Similarly, Rule 502 of the Federal Rules of Evidence does not apply to "facts and opinions" of non-testifying experts. Fed. R. Evid. 502. This court declines to extend the protections of Rule 26(b)(4)(D) to permit Defendant to essentially claw back information, already disseminated, that it did not author or control in the first instance.

As to the electronic correspondence exchanged between Ms. Knutson and the Putative Class Members, Plaintiff obtained those communications through the voluntarily disclosure of information from Defense counsel in the context of this dispute. Although the language of the Rule mentions only interrogatories or deposition as impermissible, this court finds that the documents belonging to Ms. Knutson, and which reflect facts and opinions known to her, should not be the subject of requests for production directed at Defendant. To hold otherwise risks that parties will circumvent the protections of Rule 26(b)(4)(D) by simply using a different discovery mechanism than those described in the Rule. In addition, courts both within and outside the Tenth Circuit have quashed subpoenas directed at non-testifying experts who served no other role. *See e.g., U.S. ex rel. Minge v. TECT Aerospace, Inc.*, No. 07-1212-MLB, 2012 WL 1631678, at *9 (D. Kan. May 8, 2012); *McLean v. Wright*, No. 2:09CV682-DAK-PMW, 2010 WL 1644884, at *3 (D. Utah Apr. 21, 2010); *Williams v. Bridgeport Music, Inc.*, 300 F.R.D. 120, 125 (S.D.N.Y. 2014); *United States Inspection Servs. v. NL Engineered Solutions LLC*, 268 F.R.D. 614, 617 (N.D. Cal. 2010). Therefore, this court finds as unavailing the suggestion that either subpoena or requests for production (even if the subject correspondence fell "solidly within the language of [Plaintiff's Requests for Production Nos. 1 through 4]") necessarily

correspondence between Ms. Knutson and Ms. Tyrcha so that Plaintiff's counsel would have had independent access to him.

required Defendant or Ms. Knutson to produce the electronic correspondence exchanged with the Putative Class Members.

1. Waiver

Next, the court considers whether Rule 26(b)(4)(D) protections may be waived, and whether the circumstances of this case support finding waiver. The Parties cite to no Tenth Circuit case, and this court's own research could not find one, that resolves the issue of whether waiver applies to Rule 26(b)(4)(D). Some courts within the Circuit have found that waiver applies to the protection of facts and opinions of non-testifying experts by Rule 26(b)(4)(D). *See e.g., Johnson*, 191 F.R.D. at 643. Some courts, as noted by Defendant, have found that waiver is not applicable to Rule 26(b)(4)(D). *See Precision of New Hampton, Inc.*, 2013 WL 2444047 at *4-7.

As discussed above, Plaintiff's counsel obtained the electronic correspondence from Ms. Tyrcha and Mr. Buckhold directly, rendering Rule 26(b)(4)(D) and any waiver of that Rule inapplicable to their emails. However, Plaintiff obtained the electronic correspondence exchanged with the Putative Class Members not from those individuals, but from Defense counsel in her good faith attempt to resolve this discovery dispute.⁹ [#36 at 5]. The court finds that it need not reach the question of whether a party can waive Rule 26(b)(4)(D) protection

⁹ The Parties conditioned the exchange of copies of the electronic correspondence on agreement that neither Party was conceding discoverability or admissibility. [#30 at 4]. Plaintiff's counsel ultimately contacted the Putative Class Members and obtained their responses directly from them. [*Id.*] The court confirmed at oral argument that Plaintiff ascertained the identity of those individuals, and subsequently procured the electronic correspondence involving them, as a result of Defense counsel's disclosure. Therefore, the court concludes that Plaintiff did not obtain the electronic correspondence involving the Putative Class Members in the same voluntary manner in which she obtained the electronic correspondence involving the Declarants. To find otherwise would improperly penalize Defense counsel for her forthcoming approach, and discourage parties in this and other actions from cooperating within the context of a similar discovery dispute.

because, even assuming a party can, the circumstances upon which courts have found such a waiver are not present.

First, the Declarants' voluntary disclosures do not constitute subject matter waiver so as to implicate the correspondence involving the Putative Class Members. Courts in this District, in considering waivers of work product in other contexts, have consistently held that the subject matter waiver rule does not automatically apply to disclosure of work product, and even selective disclosure to an adversary does not necessarily result in subject matter waiver of all work product on that same topic. *United States v. Graham*, No. 03-CR-089-REB, 2003 WL 23198792, at *6 (D. Colo. Dec. 2, 2003). Although the court recognizes that Rule 26(b)(4)(D) is distinct from the work product doctrine, the undersigned similarly finds that no basis exists under Rule 26(b)(4)(D) for an expansive waiver, should waiver even exist.

Second, this action lacks the circumstances typically attendant in cases where courts have found waiver of Rule 26(b)(4)(D) protection. For instance, there is no evidence in the record that Defendant relied upon the correspondence between Ms. Knutson and any of the third parties in this litigation, so there is no risk that Defendant is attempting to use Rule 26(b)(4)(D) as both a sword and a shield. *See U.S. Inspection Servs., Inc.*, 268 F.R.D. at 625; *ExxonMobil*, No. CV1210001GHKVBKX, 2014 WL 12629792, at *2 (C.D. Cal. Feb. 4, 2014). Defendant did not voluntarily provide the survey results to Plaintiff for the benefit of furthering its position in this litigation or for the settlement of this action. *See Atari Corp. v. Sega of America*, 161 F.R.D, 417, 418–20 (N.D. Cal. 1994) (holding that voluntarily providing videotape of non-testifying expert's interview and report during settlement discussions waives Rule 26(b)(4)(B) protection). And, in contrast to the *Survey Questions*, neither Defendant nor Ms. Knutson publicly disclosed the *survey responses* or the *identities* of the Putative Class Members. *Cf. Reino de Espana v.*

American Bureau of Shipping, No. 03 Civ. 3573 LTS/RLE, 2006 WL 3208579, at *7 (S.D.N.Y. Nov. 3, 2006) (finding waiver of Rule 26(b)(2)(B) when the party had voluntarily disclosed the document to two third parties).

Third, a finding of waiver in this instance does not comport with the design of Rule 26(b)(4)(D) as articulated by the Tenth Circuit, i.e., to promote fairness by precluding unreasonable access to an opposing party's diligent trial preparation. *Durflinger*, 727 F.2d at 891. The court finds that interests of fairness do not counsel exposing Ms. Knutson in her non-testifying expert capacity to discovery requests regarding facts she gathered and opinions she formed simply because the original correspondence was not kept confidential. Certainly, a non-testifying expert's failure to conduct her investigation confidentially may result in the disclosure of facts provided to her by a third party, such as in the case of Ms. Tyrcha and Mr. Buckhold. But this failure by the non-testifying expert to maintain confidentiality in the initial instance does not necessarily allow for the adverse party to then benefit from its opponent's effort and expense through one-stop discovery of those facts gathered and held by the non-testifying expert.

The court pauses here to address what it perceives as Plaintiff's most compelling argument regarding fairness, that communications between Plaintiff's class counsel and putative class members are not protected prior to certification of the class by the court. [#30 at 6 (citing NEWBERG ON CLASS ACTIONS § 9:22 (5th ed.)). Plaintiff contends that "[i]f putative class counsel cannot use the work product privilege to shield questionnaires, all the more so should counsel for defendant be denied this privilege." *Id.*] This argument, however, is based on the application of the attorney-client privilege and the work product doctrine. There is no question that Ms. Knutson's correspondence with the Putative Class Members is not covered by either the attorney-client privilege or the work product doctrine. The question, rather, is whether the court

should allow Plaintiff to pierce Rule 26(b)(4)(D)'s protection because the particular individuals targeted by Ms. Knutson's investigation are putative class members. This court concludes that this issue is better resolved within the context of the particular and exceptional circumstances of this case and the dispute, rather than through a more general discussion of Rule 26(b)(4)(D) and waiver.

2. Exceptional Circumstances

The language of Rule 26(b)(4)(D) makes clear that a party seeking to establish exceptional circumstances must demonstrate that it is impracticable for her "to obtain facts or opinions on the same subject by other means." Fed. R. Civ. P. 26(b)(4)(D)(ii). The burden of establishing exceptional circumstances is a heavy one, and rests with the party seeking disclosure. *Ager*, 622 F.2d at 503. I note first what Plaintiff does not argue. She does not argue that exceptional circumstances exist because she cannot independently ascertain the opinions of putative class members regarding the availability of accommodations for deaf individuals at the Pepsi Center. *See* [#30 at 9-10]. Indeed, Plaintiff has accessed, and presumably continues to access, putative class members through her own involvement with the Deaf community. Rather, Plaintiff argues that disclosure of the electronic correspondence between Ms. Knutson and the Putative Class Members is necessary to ensure that putative class members generally are not misled with respect to this action, and that cooperation with or confidence in class counsel is not undermined. [*Id.* at 9]. Plaintiff further argues that there exist exceptional circumstances warranting disclosure because "it was highly disingenuous for Defendant to portray Plaintiff and the Declarants as uncommon or atypical, when Defendant's only additional knowledge of the class fully supported Plaintiff's position." [*Id.* at 10]. The court will address this second argument, first.

To the extent Plaintiff argues exceptional circumstances exist because Defendant holds contrary evidence, such an argument is not persuasive. Plaintiff concedes that the difference between five and seven class members is not relevant in the overall schedule of Rule 23. *See* [#30 at 10]. Furthermore, Rule 11 of the Federal Rules of Civil Procedure bind Defendant and its counsel, and there is no assertion that either violated its obligations under that Rule in advocating against class certification. Exceptional circumstances do not arise simply because Plaintiff now knows that additional information exists that supports her position and contradicts that of her adversary, especially when the information was obtained through a good faith disclosure by Defense counsel in the context of a discovery dispute and with a reservation of rights.

Nevertheless, this court is concerned about the contact between Ms. Knutson and the Putative Class Members. While such contact is not prohibited *per se*, it is clear that in this instance, Ms. Knutson was communicating with the Putative Class Members based on talking points drafted by Defense counsel. *See* [#26 at 1-2]. Indeed, counsel drafted not only the Survey Questions, but the “introductory language, including a description of the lawsuit and its issues, as well as the questions to pose, with input from the consultant for cultural appropriateness to the Deaf community.” [*Id.*]. Upon the court’s review of the language used by Ms. Knutson, it finds potential that the language, however well-meaning, could potentially confuse, or even mislead, putative class members about not only the services offered by the Pepsi Center but the very nature of the lawsuit. *See Stransky v. HealthONE of Denver, Inc.*, 929 F. Supp. 2d 1100, 1109 (D. Colo. 2013). To the extent such language is inaccurate, as Plaintiff suggests, or raises issues with respect to the ability of Plaintiff or Plaintiff’s counsel to represent the class, *see* [#30 at 3-5], Plaintiff is entitled to discover the correspondence exchanged between Ms. Knutson and the

Putative Class Members so as to explore such concerns. There is no practical way for Plaintiff to obtain such information except by viewing the actual electronic correspondence. And while Defendant contends that any prejudice arising from the contact between Ms. Knutson and the two Putative Class Members has been cured, *see* [#30 at 4], this court has no way to independently verify that contention, and notes that Plaintiff did not concede lack of prejudice in either her briefing or at oral argument.

Based on the specific circumstances presented herein, this court finds that Plaintiff has carried her heavy burden of establishing that exceptional circumstances exist to justify disclosure of facts and opinions known to Defendant's non-testifying expert.

CONCLUSION

For the foregoing reasons, **IT IS ORDERED** that:

- (1) The Motion for Protective Order and to Quash Subpoena Duces Tecum filed by Defendant Kroenke Arena Company, LLC [#26] is **DENIED**; and
- (2) Consonant with this court's findings as stated herein, the Clerk of the Court is **DIRECTED** to **UNRESTRICT** the [#30] Opposition to Motion for Protective Order and to Quash Subpoena Duces Tecum, and the Parties shall disregard the [#44] Minute Order directing them to file an associated motion to restrict on or before July 21, 2017.

DATED: July 20, 2017

BY THE COURT:

s/ Nina Y. Wang
United States Magistrate Judge