UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

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CUNG LE, et al., Plaintiffs, v. ZUFFA, LLC, et al, Defendants.	Case No. 2:15-cv-01045-RFB-PAL **ORDER** (Mot Challenge Privilege – (Dkt. ##227/229)

Before the court is Plaintiffs' Motion to Challenge Privilege Designation (Dkt. #227) filed under seal, and the redacted version (Dkt. #229) filed on the public record. The court has considered the motion, Defendant Zuffa, LLC's opposition (Dkt. #231), and numerous related filings.[1]

BACKGROUND

I. THE AMENDED COMPLAINT AND PROCEDURAL HISTORY

Plaintiffs filed their Consolidated Amended Antitrust Class Action Complaint (Dkt. #208) on December 18, 2015. It is a civil antitrust action under Section 2 of the Sherman Act, 15 U.S.C. § 2, for treble damages and other relief arising out of allegations of Zuffa's anti-competitive scheme to maintain and enhance a monopoly power in the market for promotion of live elite professional Mixed Martial Arts ("MMA") fighter bouts and monopsony power of the market for live elite professional MMA fighter services. The named Plaintiffs bring suit on behalf of themselves and as a class action on behalf of others similarly situated under Rule 23 of the Federal Rules of Civil Procedure against Zuffa, operating under the trademark Ultimate Fighting

[1] The papers in this case were filed in a confusing fashion and were not linked by docket numbers. Rather than list all of the docket numbers concerning matters filed on the public record, and matters filed under seal and redacted, the court assures the parties it has reviewed all of the moving and responsive papers pertinent to this motion.

Championship or "UFC". Plaintiffs claim that the UFC has engaged in an illegal scheme to eliminate competition from would-be MMA promoters by systematically preventing them from gaining access to resources critical to successful MMA promotions, including by imposing extreme restrictions on UFC fighters' ability to fight for would-be rivals during and after their tenure with the UFC. The amended complaint claims that as part of its scheme, UFC controls not only fighter careers, but also takes and expropriates the rights to their names and likeliness in perpetuity. As a result of this conduct, UFC fighters are paid a fraction of what they would earn in a competitive marketplace.

II. THE PARTIES' DISPUTE

A. Plaintiff's Motion to Challenge Privilege

In the current motion, Plaintiffs challenge the designation of an email as privileged. For ease of reference the email is referred to as the "Milbank email." It was produced by Zuffa in response to Request for Production No. 54, which sought all documents or communications provided to or received from any government agency, including the Federal Trade Commission ("FTC"). The Milbank email was produced as part of approximately 108,000 documents that Zuffa had originally produced to the FTC in 2011 during an FTC investigation of Zuffa's acquisition of rival promoter Strikeforce. The email was produced with an electronic slip sheet indicating it was withheld as privileged, but the document itself was not removed from the production.

On January 27, 2016, Plaintiffs notified Zuffa that it had produced a number of documents with slip sheets indicating they were privileged, along with the documents themselves. Plaintiffs inquired whether Zuffa intended to produce the text of the documents and whether it claimed the documents were privileged. Zuffa responded on February 12, 2016, that the documents were protected by the attorney-client privilege. Plaintiffs requested that Zuffa state with specificity the basis for its assertion of privilege. Zuffa responded on March 4, 2016, submitting a redacted version of the Milbank email claiming certain portions were privileged and certain portions were not. On March 16, 2016, Plaintiffs agreed to return four of the documents

Zuffa claimed were privileged, but dispute some of the redacted portions of the Milbank email are attorney-client protected.

The Milbank email concerns Zuffa's acquisition of Pride FC, a rival mixed martial arts promoter. It is a January 31, 2007 email sent by Zuffa's outside counsel, C. Thomas Paschal, of Milbank, Tweed, Hadley & McCloy, LLP, to two Zuffa managers and its CEO, COO, and CFO, and copied to two other Milbank lawyers. Plaintiffs maintain that the redacted portions of the document are not privileged because there is no analysis of any law or statute, no legal advice is communicated, and the document either rehashes the respective positions of the parties to an arms-length business transaction, or states Zuffa's business intention in pursuing the acquisition. Plaintiffs rely on a line of cases holding that a company's business objectives in entering into a transaction are not privileged, and that when a lawyer serves as a negotiating agent communicating negotiations to his client, the attorney-client privilege is not implicated.

Plaintiffs concede that certain paragraphs of the communication were appropriately redacted. However, Plaintiffs also argue that Zuffa waived any arguable claim of privilege by producing other communications by Mr. Paschal concerning the same negotiation and by producing a redacted version of the disputed email. Relying on the doctrine of selective waiver, Plaintiffs argue that fundamental fairness prohibits a privilege holder from selectively disclosing privileged communications to an adversary revealing those that support the adversary's case while withholding information that is less favorable. Plaintiffs therefore ask the court to order Zuffa to withdraw the challenged redactions to the email and produce an appropriately modified version for Plaintiff's use in this litigation.

One of the Plaintiffs' claims in this case is that Zuffa acquired Pride FC as part of an anti-competitive scheme to acquire and eliminate rivals. *See* Plaintiffs' Consolidated Complaint (Dkt. #208), ¶ 14. Zuffa's President, Dana White, made conflicting statements about the Pride acquisition. On the one hand he boasted "Pride is dead, dummy! I killed them!!!" *Id.* at ¶ 129. On the other hand, White also made statements denying that Zuffa intended to kill Pride in public statements, and Zuffa denied that it purchased Pride FC as part of a scheme to acquire and eliminate rivals in its answer. (Dkt. #212, ¶ 17).

B. Zuffa's Opposition

Zuffa opposition recites the history of its 2011 production to the FTC. On August 19, 2011, Zuffa's counsel inadvertently produced three documents, including the Milbank email at issue in Plaintiffs' motion. Counsel for Zuffa wrote to FTC staff, explained the inadvertent production of three privileged documents, and obtained the FTC's agreement to clawback the documents. The documents, including the Milbank email, were listed on the privilege log Zuffa provided to the FTC. However, an error by Zuffa's vendor resulted in its inadvertent production. Zuffa produced the FTC production to the Plaintiffs in response to Request for Production No. 54 in November 2015. To expedite production of the FTC materials, counsel for the parties agreed Zuffa would reproduce its production to the FTC concerning the Strikeforce investigation "in the form in which it was initially produced." Zuffa's counsel reproduced the FTC production in the form in which it received those documents from the e-discovery vendor that handled the 2011 production. Counsel for Zuffa did not realize that the FTC production was transferred to current counsel for Zuffa with extracted text, rather than as-produced text. The result is that Zuffa's current counsel inadvertently produced a group of documents containing slip sheets identifying the documents were withheld as privileged, but with extracted text reflecting the underlying privileged information rather than the OCR'd text of the slip sheet that had been produced to the FTC to correct the original inadvertent production in 2011.

On January 27, 2016, counsel for Plaintiffs wrote informing Zuffa that the information from the documents designated as privileged were viewable. Counsel for Zuffa responded a short time later the same day after investigating the matter and confirmed that the documents identified by Plaintiffs were privileged, likely inadvertently produced to the FTC in the first instance, and that the inadvertent production of the documents did not waive Zuffa's privilege.

During a subsequent investigation, counsel for Zuffa confirmed that the Milbank email was inadvertently produced in 2011, identified the technical error that caused the inadvertent production, and provided Plaintiffs with clawback correspondence between the FTC and Zuffa from 2011. The parties discussed an appropriate solution and decided to provide a text file overlay for the entire production. Zuffa provided that overlay on February 12, 2016. Plaintiffs

demanded further information regarding the basis for the assertion of privilege for five documents, including the Milbank email. Zuffa responded with justifications for asserting the privilege, provided a copy of the privilege log it provided to the FTC in its native Excel format, and a redacted version of the Milbank email to Plaintiffs. It was not until April 1, 2016, that Plaintiffs decided to challenge the privilege designation.

Zuffa contends that the Milbank email contains legal advice from Zuffa attorney, Charles Thomas Paschal. The law firm of Milbank, Tweed, Hadley and McCloy was retained in 2006 to provide legal representation regarding the potential acquisition of the assets of Dream Stage Entertainment, owner of the Japan-based MMA promoter Pride FC. Mr. Paschal was the senior level associate with the firm who worked on the matter under the direction of managing partner, Kenneth Baronsky.

The opposition is supported by the declaration of Mr. Paschal. In it, Paschal avers that in the course of representing Zuffa, both he and his managing partner received confidential information from Zuffa for the purpose of evaluating and making recommendations regarding the legal ramifications of the structure, timing, and other terms of the proposed acquisition transaction, as well as the extent of the due diligence and other legal requirements to be performed in advance of the proposed acquisition. Paschal Declaration ¶ 3. Paschal traveled to Tokyo, Japan in January 2007, to meet with executives from Dream Stage and their counsel regarding the proposed acquisition. *Id.* ¶ 4. After the meeting, Mr. Paschal sent an email to two of Zuffa's managers and its CEO and COO copying two other Milbank lawyers. *Id.* ¶ 5. The email discussed: implications and reasons underlying Milbank's advice regarding, among other things; due diligence and the letter of intent; the timing and structure of this transaction; and further analyses and services that would be necessary to move forward, such as obtaining tax advice. *Id.*

Zuffa maintains that the unredacted portions of the Milbank email consists of Paschal's reports of the positions that Dream Stage's representatives communicated to him and the positions that he communicated to Dream Stage on behalf of Zuffa. Zuffa contends that the redacted portions of the email consist of Paschal's communication to Zuffa and other lawyers

which consists of confidential legal advice developed in the course of due diligence performed by the firm on Zuffa's behalf and confidential disclosures made by Zuffa to its outside counsel to obtain legal advice regarding the acquisition of assets from Dream Stage. The first redacted paragraph also reflects Mr. Paschal's impressions of confidential disclosures made by Zuffa to its attorneys at Milbank for the purpose of seeking legal advice and conveys legal advice from Paschal to Zuffa based on and regarding the extent of due diligence performed on the proposed acquisition.

The second redacted paragraph contains Mr. Paschal's impressions of confidential communications made by Zuffa to its attorneys for the purpose of obtaining legal advice. Zuffa therefore seeks to clawback the document under Rule 501 of the Federal Rules of Evidence which shields attorney-client communications from disclosure. The touchstone of whether a communication falls within the scope of the attorney-client privilege is whether the communication either seeks or renders legal advice. Both sides agree that the Ninth Circuit applies an eight-part test to determine whether the attorney client privilege applies. Zuffa acknowledges it has the burden of establishing that all of the elements of the privilege are met. Citing *Ideal Electric Co. v. Flowerserve Corp.*, 230 F.R.D. 603 (D. Nev. 2005), Zuffa argues that the attorney-client privilege "applies to communications between lawyers and their clients when the lawyers act in a counseling or planning role . . . ." *Id*. at 607.

Zuffa maintains that the mere fact that an attorney may discuss business issues in a communication does not defeat the privilege. Zuffa concedes that the attorney-client privilege does not apply to communications that do not give, solicit, or reflect legal advice, citing *Wellnix Life Sciences*, *Inc. v. Iovate Health Sciences Research*, *Inc.*, 2007 WL 1573913, at *2 (S.D.N.Y May 24, 2007) (quoting *In re: County of Erie*, 473 F.3d 413, 418 (2nd Cir. 2007)). However, Zuffa argues that the fact that a communication relates to a business purpose is not dispositive. In dual-purpose documents the "issue is not whether any business considerations were also under discussion between the attorney and client, but 'whether the predominant purpose of the communication is to render or solicit legal advice.'" *Id*.

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Zuffa asserts that the redacted portions of the Milbank email were privileged from their inception and satisfy all of the elements of the attorney-client privilege. The content of the redacted paragraphs clearly address legal issues. The fact that the emails do not contain citations to statute, laws, or rules does not transform legal advice into business advice. Zuffa relies on cases in the Second Circuit holding that documents are protected by privilege even when they include references to, or fairly extensive discussions of, financial questions and issues of commercial strategy and tactics as long as they do so in a context that makes it evident that the attorney is presenting the issues and analyzing the choices on the basis of his legal expertise.

Zuffa claims that the cases cited by Plaintiffs support its decision to unredact portions of the email where Mr. Paschal is reporting facts learned from a third party and its decision to redact those privileged portions. Zuffa contends that the redacted portions of the Milbank email address communications from Zuffa's outside counsel "on matters squarely within the ken of legal advice." Specifically, the redactions concern the nature and extent of due diligence and whether and when the letter of intent would become binding, and the relationship between these issues in addition to the ramifications of particular tax structures for the proposed transaction.

Zuffa disputes that it waived the privilege over the redacted portions of the email by producing unredacted portions of the email. The unredacted portions of the email are not privileged, so no waiver results. A contrary ruling would perversely penalize Zuffa for carefully distinguishing between privileged and non-privileged aspects of the communication in redacting documents, and encourage overbroad privilege claims. Courts routinely allow or order redactions of documents containing a mix of protected privileged communications and business advice. None of the cases cited by the Plaintiffs support the proposition that the disclosure of information that parties agree is not privileged can result in a waiver of the material that is otherwise privileged. Finally, Zuffa disputes that Plaintiffs have asserted the advice of counsel is an affirmative defense to Plaintiffs' complaint allegations. Zuffa asks that the court deny Plaintiffs' motion to challenge the privilege and award reasonable costs and attorney's fees under Rule 37(a)(5)(B) because the motion was not substantially justified and no other circumstances would make an award of expenses unjust.

DISCUSSION

The attorney-client privilege protects confidential disclosures made by a client to an attorney to obtain legal advice and an attorney's advice in response to such disclosures. *United States v. Chen*, 99 F.3d 1495, 1501 (9th Cir. 1996) (quotation omitted). "The attorney-client privilege is the oldest of the privileges for confidential communications known to the common law." *Upjohn Co.*, *v. United States*, 449 U.S. 383, 389 (1981). It serves to protect confidential communications between a party and its attorney in order to encourage "full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice." *Id.* The privilege applies where legal advice of any kind is sought from a professional legal advisor in her capacity as such, and the communication relates to that purpose, and is made in confidence by or for the client. *Id.* In the Ninth Circuit, an eight-part test determines whether information is covered by the attorney-client privilege: (1) where legal advice of any kind is sought, (2) from a professional legal advisor in his or her capacity as such, (3) the communications relating to that purpose, (4) made in confidence, (5) by the client, (6) are, at that instance, permanently protected, (7) from disclosure by the client or by the legal advisor, and (8) unless the protection is waived. *United States v. Graf*, 610 F.3d 1148, 1156 (9th Cir. 2010); *LightGuard Sys., Inc. v. Spot Devices, Inc.*, 281 F.R.D. 593, 597–98 (D. Nev. 2012).

"The burden is on the party asserting the privilege to establish all the elements of the privilege." *United States v. Martin*, 378 F.3d 988, 999–1000 (9th Cir. 2002). The party asserting the attorney-client privilege must establish the attorney-client relationship and the privileged nature of the communication. *United States v. Bauer*, 132 F.3d 504, 507 (9th Cir. 1997). A party claiming the attorney-client privilege "must identify specific communications and the grounds supporting the privilege as to each piece of evidence over which privilege is asserted." *Martin*, 278 F.3d at 1000. Blanket assertions of attorney-client privilege are "extremely disfavored." *Id.* Additionally, "the communication must be between the client and lawyer for the purpose of obtaining legal advice." *Id.* "The fact that a person is a lawyer does not make all communications with that person privileged." *Id.* at 999. The party asserting the privilege must,

at a minimum, make a prima facie showing that the privilege protects the information the party intends to withhold. *In re Grand Jury Investigation*, 974 F.2d 1068, 1071 (9th Cir. 1992).

Not all communications between an attorney and client are privileged. Information such as the identity of the client, the amount of the fee, the identification of payment by case file name, the general purpose of the work performed, and whether an attorney coached a client in his testimony is not privileged. *See, e.g.*, *United States v. Carrillo*, 16 F.3d 1046, 1050 (9th Cir. 1994); *Clarke v. Am. Commerce Nat'l Bank*, 974 F.2d 127, 129 (9th Cir. 1992). Similarly, when an attorney is merely communicating information, such as an order to appear in court, the communications between the attorney and the client are not privileged. *United States v. Gray*, 876 F.2d 1411, 1415–16 (9th Cir. 1989) (holding attorney-client privilege did not preclude lawyer from testifying he advised client of the sentencing date in prosecution of client for failure to appear); *McKay v. Comm'r Internal Revenue Service*, 886 F.2d 1237, 1238 (9th Cir. 1989) (holding testimony of taxpayer's attorney that the gave taxpayer a copy of deficiency notice from the IRS in ample time to file a petition timely did not violate the attorney-client privilege).

The attorney-client privilege is a rule of evidence; it has not been held a constitutional right. *Clutchette v. Rushen*, 770 F.2d 1469, 1471 (9th Cir. 1985). "Because it impedes full and free discovery of the truth, the attorney-client privilege is strictly construed." *Weil v. Investment/Indicators*, *Research & Mgmt.*, *Inc.*, 647 F.2d 18, 24 (9th Cir. 1980). The party asserting the attorney-client privilege has the burden of proving the attorney-client privilege applies. *Id.* at 25. "One of the elements that the asserting party must prove is that it has not waived the privilege." *Id.* The attorney-client privilege is waived when communications are made in the presence of third parties. *United States v. Gann*, 732 F.2d 714, 723 (9th Cir. 1984). It is well established that "voluntary disclosure of the content of a privileged attorney communication constitutes a waiver of the privilege as to all other such communications on the same subject." *Id.* In *Weil*, the Ninth Circuit recognized that waiver of the privilege "may be effected by implication" and by inadvertent disclosure. *Id.* Additionally, "the subjective intent of the party asserting the privilege is only one factor to be considered in determining whether waiver should be implied." *Id.*

Courts narrowly construe the privilege and recognize it "only to the limited extent that ... excluding relevant evidence has a public good transcending the normal predominate principal of utilizing all rational means for ascertaining the truth." *Trammel v. United States*, 445 U.S. 40, 50 (1980); *Weil*, 647 F.2d at 24 ("Because it impedes full and free discovery of the truth, the attorney-client privilege is strictly construed."). Similarly, because the attorney-client privilege is in derogation of the truth-finding process and must be strictly construed, "the privilege should attach only where extending its protection would foster more forthright and complete communication between the attorney and her client *about the client's legal dilemma.*" *United States v. ChevronTexaco Corp.*, 241 F. Supp. 2d 1065, 1070 (N.D. Cal. 2002) (emphasis in original).

Generally, the voluntary disclosure of privileged attorney-client communications constitutes a waiver of the privilege as to all other such communications dealing with the same subject matter. *United States v. Zolin*, 809 F.2d 1411, 1415 (9th Cir. 1987), *rev'd in part on other grounds by* 491 U.S. 554 (1989). "In order to establish the applicability of the attorney-client privilege to a given communication, the party asserting the privilege must affirmatively demonstrate non-waiver." *Id.* Any disclosure inconsistent with maintaining the confidential nature of the attorney-client relationship waives the privilege. *Id.* The Ninth Circuit employs a three-prong test to determine whether a waiver of the attorney-client privilege has occurred. *United States v. Amlani*, 169 F.3d 1189, 1195 (9th Cir. 1999). First, the court considers whether a party is asserting the attorney-client privilege as a result of some affirmative act. *Id.* Second, the court examines whether the party asserting the privilege through an affirmative act has put the privileged information at issue. *Id.* Third, the court evaluates whether allowing the privilege would deny the opposing party access to information vital to its case. *Id.*

Applying these principles, the court finds the majority of the redacted paragraphs in dispute in this motion are not privileged. The first redacted paragraph relates Pride FC's negotiating positions, the fact the Pride did not trust Zuffa anymore than Zuffa trusted Pride, and that Pride did not want its business tied up any longer in negotiations. The paragraph reports the parties' negotiating positions and contains no legal analysis or advice. The second paragraph

relates Zuffa's business purpose for the acquisition—to stop others from buying Pride and to acquire Pride to shut the business down and acquire its fighters for the UFC. It relates Pride's negotiating position that resulted Zuffa's business decision to set a low threshold for due diligence before the deal became binding on both sides. However, a portion of the last sentence of the paragraph relates the client's concern about a legal matter. In context, it appears to be a legal issue the client and counsel discussed in the expectation it was a confidential communication. The remaining communications do not relate to legal advice sought by or given to Zuffa. Mr. Pachal relates Pride's communications to him during the course of business negotiations. Mr. Paschal was merely serving as a conduit of this information from Pride to his client, Zuffa. The other communications relate to the negotiating parties' commercial strategies and tactics. As such, they are not privileged.

For the reasons explained,

IT IS ORDERED Plaintiff's Motion to Challenge Privilege is **GRANTED,** and Zuffa shall produce the Milbank email to Plaintiffs unredacted of the paragraphs in dispute with the exception of the last sentence of disputed paragraph two which may remain redacted from "and you had expressed" through the end of the sentence.

DATED this 26th day of May, 2016.

PEGGY A. LEEN
UNITED STATES MAGISTRATE JUDGE