

Privilege Designations

Dean Boland <dean@bolandlegal.com>

Fri, Feb 24, 2012 at 8:04 PM

To: Alexander Southwell <asouthwell@gibsondunn.com>, Paul Argentieri <paul.argentieri@gmail.com>

Cc: Bryan Rose <BRose@strozfriedberg.com>

Alex:

We will produce Document 337.

Document 348 is an email between James Kole, Paul Ceglia and Amanda C. Wornhoff. Although Mr. Kole was Senior Assistant Attorney General of Illinois at the time of the email, he previously worked at Sidley Austin and, while in private practice, served as Mr. Ceglia's counsel in legal matters related to StreetFax and Facebook. Ms. Wornhoff is a staff member at Sidley, and this document concerns the existence of communications--relevant to this litigation and/or Mr. Kole's Sidley Austin files. This document concerns matters related to Mr. Kole's representation of Mr. Ceglia, and are thus protected by the attorney-client privilege.

Documents 373, 400, 401, 402, 403 and 405 are emails that were sent to or by David Grable, an attorney at Quinn Emanuel. Each of these communications discusses matters related to this litigation, and occurred while Mr. Ceglia was considering whether to formally retain Mr. Grable as counsel. The documents discuss confidential facts relating to this case, case strategy, and legal advice. Such communications are plainly protected by the attorney-client privilege. See *Newmarkets Partners, LLC v. Sal. Oppenheim Jr. & Cie. S.C.A.*, 258 F.R.D. 95, 100 (S.D.N.Y. 2009) ("An attorney-client relationship can arise prior to formal engagement. As a result, privilege may attach to a prospective client's 'initial statements' to an attorney who is not ultimately hired. See *United States v. Dennis*, 843 F.2d 652, 656 (2d Cir.1988).

Document 334, which was previously described as concerning "a hushmail" account, is protected by the attorney-client privilege. It is a communication between Mr. Ceglia and his attorney, Mr. Argentieri; it was not addressed or disclosed to any third party; and it involves the provision of legal advice in that it discusses case strategy, the filing of an amended complaint, securing communications regarding the case, and the retention of counsel.

Documents 360 and 379 are communications to which Jason Holmberg was a party. Mr. Holmberg was retained as a consultant to Mr. Ceglia's attorney, Paul Argentieri, and he has served as Mr. Argentieri's consultant and agent on matters pertaining to this litigation. Documents 360 and 379 are communications that were prepared in the context of this position, at the behest of an attorney. Because they were prepared in anticipation of the litigation and for a party by his representative, they are protected by the attorney-client privilege and work product doctrine. N.Y. C.P.L.R. § 4503(a)(1) (absent waiver, a client cannot be compelled to disclose any "confidential communication made between the attorney or his or her employee and the client in the course of professional employment...") (emphasis added); See *United States v. Adlman*, 68 F.3d 1495, 1501 (2d Cir.1995) (noting that the work product doctrine "shields from disclosure materials 'prepared in anticipation of litigation' by a party or the party's representative, absent a showing of substantial need.")

The disclosure of one document can only serve as waiver of the attorney-client privilege and work product doctrine if the waiver was intentional, the disclosed and undisclosed communications concern the same subject matter, and they ought in fairness to be considered together. Fed. R. Evid. 502(a). Here, the purported "waiver" was not intentional, except to the extent that Plaintiff intended to comply with this Court's order. Moreover, Document 360 concerns work for hire contracts, a completely unrelated subject matter to the disclosed email, and it does not impact the ability to evaluate the produced email or its attachment.

To the extent the Court's order did not require that the email be produced together with the attachment, such disclosure was inadvertent. Inadvertent disclosures do not operate as a waiver if Plaintiff took reasonable steps to prevent disclosure and promptly took reasonable steps to rectify the error. Fed. R. Evid. 502(b). Plaintiff plainly attempted to prevent disclosure by including the document on its August 29, 2011, privilege log. Mr. Argentieri and Mr. Holmberg signed an agreement indicating his work was on behalf of Paul Ceglia.

Dean Boland.

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Dean Boland
Owner/Member
Boland Legal, LLC

EXHIBIT H