IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

AVIS RENT A CAR SYSTEM, LLC, et al.,	:	
		Case No. 3:12-cv-399
Plaintiffs,	:	
v.		JUDGE WALTER H. RICE
CITY OF DAYTON, OHIO,	:	
Defendant.		

ENTERPRISE RENT A CAR COMPANY OF CINCINNATI, LLC dba ENTERPRISE RENT-A-CAR, et al.,	:	Case No. 3:12-cv-405
	:	
Plaintiffs,		JUDGE WALTER H. RICE
v.	:	
CITY OF DAYTON, OHIO,		
Defendant.		

DECISION AND ENTRY SETTING FORTH THE RESULTS OF THE COURT'S *IN CAMERA* INSPECTION OF PLAINTIFFS' JOINT LITIGATION, COOPERATION AND CONFIDENTIALITY AGREEMENT

On February 18, 2013, Defendant City of Dayton, Ohio ("City," "Defendant") filed a Motion to Compel [Production of] Joint Litigation, Cooperation

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and Confidentiality Agreement and Privilege Logs (Doc. #24 of Case No. 3:12-cv-399 ("Avis Case") and Doc. #25 of Case No. 3:12-cv-405 ("Enterprise Case")). The City argued that the Joint Litigation, Cooperation and Confidentiality Agreement (hereinafter, "Joint Agreement"), an agreement between Plaintiffs Avis Rent A Car System, LLC and Budget Rent A Car System, Inc. ("Avis Plaintiffs") and Plaintiffs Enterprise RAC Company of Cincinnati, LLC dba Enterprise Rent-A-Car and Vanguard Car Rental USA, LLC dba National and Alamo ("Enterprise Plaintiffs") was a document subject to discovery under Federal Rule of Civil Procedure 26(b)(1). The Enterprise Plaintiffs filed a Response in Opposition on March 1, 2013 (Enterprise Case at Doc. #27), and the Avis Plaintiffs filed a Response in Opposition on March 8, 2013 (Avis Case at Doc. #28). Plaintiffs argued that the Joint Agreement is protected by the "common interest doctrine," an extension of attorney-client privilege "where two or more clients with a common interest in a matter are represented by separate lawyers and agree to exchange information concerning the matter," and therefore insulated from discovery under Federal Civil Rule 26(b)(1). *Reed v. Baxter*, 134 F.3d 351, 357 (6th Cir. 1998).

On July 18, 2013, the Court sustained in part and overruled in part, without prejudice, the City's Motion to Compel. Doc. #64. The Court overruled the City's motion insofar as it requested an order compelling the production of the Joint Agreement to the City, but sustained the motion's request to order the production of the Joint Agreement for an *in camera* inspection by the Court. The Court

ordered Plaintiffs to produce the Joint Agreement within seven (7) days of its order. Plaintiffs complied, and provided the Court with a copy of the Joint Agreement by email on July 25, 2013. The Court has reviewed the Joint Agreement, and sets forth its findings below.

The attorney-client privilege, and the common interest doctrine, which Plaintiffs claim protect the Joint Agreement from disclosure, are both recognized under Ohio law. *See* Ohio Rev. Code § 2317.02(A)(1) (protecting attorney-client communications); *State ex rel. Bardwell v. Ohio Atty. Gen.*, 181 Ohio App.3d 661, 2009-Ohio-1265, 910 N.E.2d 504 ¶¶ 87-88 (Ohio Ct. App. 2009) (expanding the attorney-client privilege, through application of the common interest doctrine, to allow the redaction of an email containing communications between two attorneys general discussing an interstate student loan investigation). The common interest doctrine "typically arises in the context of litigation when two parties are either represented by the same attorney or are independently represented but have the same goal in the litigation. Under those circumstances, they may freely share otherwise privileged communications without waiving the [attorney-client] privilege." *Fresenius Medical Care Holdings, Inc. v. Roxana Lab., Inc.*, No. 2:05-cv-0889, 2007 WL 895059 at *2 (S.D. Ohio Mar. 21, 2007). In *Fresenius*, Magistrate Judge Kemp explained that:

> the purpose of the doctrine is to permit persons with similar legal interests, but represented by different counsel, to enjoy the same ability to communicate confidentially about their common interests with multiple attorneys that each client enjoys separately. Such communications foster the furtherance of the common interest and

> encourage the parties to make full and adequate disclosure to the attorneys who, jointly, have been tasked with accomplishing the legal interests of their respective clients.

Id. (citing *In re Regents of Univ. of California*, 101 F.3d 1386, 1389 (Fed. Cir. 1996).

Here, the common interest doctrine applies to Plaintiffs and the privilege they share with their attorneys. The Avis and the Enterprise Plaintiffs have the same goal in this litigation: a remedy for the City's breach of their respective lease agreements, which, although separately signed agreements, are identical in all material respects that are relevant to their claims. For that reason, it was not necessary for the Court to distinguish between the parties' individual lease agreements in its Decision and Entry that granted summary judgment to Plaintiffs. *See* Avis Case, Doc. #77 at 20-34 and Enterprise Case, Doc. #74 at 20-34) (analyzing language of the parties' lease agreements). Furthermore, the City's actions that constituted the breach of their agreements, which included the repudiation of the twenty-year lease term and the implementation of a permit process to replace the agreements, affected each Plaintiff in the same manner without being directed at any one of them individually. Plaintiffs have had the same goal in this litigation since it commenced, and have memorialized their agreement to jointly litigate without waiving attorney-client privilege in the Joint Agreement. Under the common interest doctrine, that privilege extends to protect the Joint Agreement from discovery.

Furthermore, in spite of the City's assertion that the Joint Agreement contains communications that are "unquestionably relevant," (Doc. #24 at 4), the Court's *in camera* review has revealed that while the Joint Agreement is broadly relevant to the "subject matter of the action," it is of little, if any, relevance to any claim or defense a party to this action might assert, the standard for a discoverable document under Federal Rule of Civil Procedure 26(b)(1). In *Biovail Laboratiories International, SRL v. Watson Pharmaceuticals, Inc.*, No. 10-20526-CIV, 2010 WL 3447187 (S.D. Fla. Aug. 30. 2010), the court declined to recognize the relevancy, under Federal Rule 26(b)(1), of a similar agreement. The *Biovail* court proceeded from the principle that "[a] joint defense agreement that 'merely contains language that parties typically include in joint defense agreements to protect from discovery privileged information revealed to a third party' is not relevant to any parties' claims or defenses." *Id.* (quoting *Warren Distrib. Co. v. InBev USA L.L.C.*, No. 07-1053, 2008 WL 4371763 (D.N.J. Sept. 18, 2008)). The *in camera* review revealed that the agreement "contain[ed] only boilerplate terms designed to protect from discovery the confidential information shared," and that it was "a garden variety joint defense agreement that merely set[] up a framework of procedures for the parties to share information while preventing disclosure of confidential materials to third parties." *Id.* The only information relevant to the parties' claims or defenses was the identification of the parties, because the fact that such an agreement exists may demonstrate bias. *Id.*

Here, the Court's *in camera* review of the Joint Agreement shows that it was executed on behalf of Plaintiffs by their counsel on December 4, 2012. The Joint Agreement identifies the Ready/Return Agreements of March 4, 2009, the Memorandum of Understanding signed on May 2, 2008, and the original Concession Agreements signed on December 16, 2006, that they and the City are parties to and expresses a common interest that Plaintiffs share in any litigation that arises from the aforementioned agreements. The aforementioned information identifies the parties and is relevant to the claims or defenses of the parties to this action. The remainder of the Joint Agreement, however, is devoted to discussing the mutual disclosure of litigation materials and the non-disclosure of privileged materials to third parties in general and broad terms, akin to the agreement discussed in *Biovail*. The Court hesitates to characterize those provisions as simply "boilerplate," but recognizes that they do not specifically reference or mention any of the claims or defenses of the parties to the present action. The language therein is sufficiently general and non-specific that it could be reproduced, without revision, in order to draft another joint litigation agreement in another action for different parties.

The Court concludes that the Joint Agreement is, at best, minimally relevant to either "party's claim or defense" under Federal Rule 26(b)(1), Furthermore, it is protected by the extension of the attorney-client privilege that arises from Plaintiffs' similar, if not identical, legal interests under the common interest doctrine. Accordingly, the Court rules that the Joint Litigation Agreement falls

outside the scope of discoverable "nonprivileged matter that is relevant to any party's claim or defense" under Federal Rule 26(b)(1).

Date: August 5, 2013

WALTER H. RICE
UNITED STATES DISTRICT JUDGE