IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

AMERICAN AIRLINES, INC.	§	
	§	
VS.	§	**CIVIL ACTION NO. 4:11-CV-244-Y**
	§	
TRAVELPORT LIMITED, ET AL.	§	

AMENDED[1] ORDER PARTIALLY GRANTING PLAINTIFF'S AMENDED MOTION TO COMPEL PRODUCTION OF DOCUMENTS AND DENYING AS MOOT MOTION FOR LEAVE

Pending before the Court is Plaintiff American Airlines, Inc. ("American)'s Combined (I) Amended Motion to Compel Production of Documents Wrongfully Withheld Under the Guise of Privilege by the Travelport Defendants ("Motion to Compel"), and (II) Motion for Leave to File Supplemental Amended Motion ("Motion for Leave") [doc. # 316], filed May 7, 2012. Having carefully considered the motions, response, reply, and supplemental briefing, the Court concludes that American's Motion to Compel should be PARTIALLY GRANTED and American's Motion for Leave should be DENIED AS MOOT.

I. BACKGROUND

In its motion, American claims, *inter alia*, that Defendants Travelport Limited and Travelport L.P. (collectively referred to hereinafter as "the Travelport Defendants" or "Travelport") "continues to improperly shield ***hundreds*** of relevant, nonprivileged documents by claiming they are privileged when in fact they are not." (American's Motion to Compel Production of Documents ("Pl.'s Mot.") at 1. American argues that Travelport is improperly claiming as privileged four categories of communications: (1) communications with Defendant

[1]This order is amended to correct an error regarding the production of exemplar 16 (not 13) in part III. of the original order issued on July 12, 2012.

Orbitz Worldwide, LLC ("Orbitz") based on a "common interest" exception to waiver of the attorney-client privilege; (2) communications with Blackstone Group, L.P. ("Blackstone")[2] based on the fact that Blackstone is allegedly the Travelport Defendants' parent company and majority owner; (3) communications that allegedly discuss purely business matters; and (4) communications which do not involve attorneys. (Pl.'s Mot. at 2, 9-19.) American requests that the Court examine one hundred exemplar documents identified by American as representative of documents that are improperly being withheld, and, based upon the Court's review, order the Travelport Defendants to produce the exemplars and all similar non-privileged documents improperly listed anywhere on its privilege log. (Pl.'s Mot. at 19.) American also requests that, "in light of Travelport's recent production of hundreds of documents it wrongfully withheld as privileged, American's deadline to file an amended motion as to any remaining disputed matters be extended to May 21, 2012, such that American has the opportunity to review the documents produced by Travelport and analyze Travelport's revised privilege log." (Pl.'s Mot. at 2; *see* Pl.'s Mot. at 19-20.)

In its response dated May 14, 2012, the Travelport Defendants claim that they have: (1) produced nearly 1.5 million pages of documents to American; (2) "carefully addressed" each of the issues raised in American's original motion to compel filed on April 6;[3] and (3) re-reviewed thousands of documents previously withheld for privilege and amended their privilege logs. (Defendants' Response to Plaintiff's Amended Motion to Compel ("Defs.' Resp.") at 1. The

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[2]The Travelport Defendants state that the actual name of their parents corporation is Blackstone LR Associates V Ltd. (Defs.' Resp. at 12.)

[3] American filed its original motion to compel [doc. 290] on April 6, 2012. In an order dated April 16, 2012, the Court ordered the parties to "confer and make a good-faith effort to resolve this discovery dispute between themselves."

Travelport Defendants argue that American has "raised a host of new demands that exceed the scope of its April 6 motion." (Defs.' Resp. at 1.) In addition, the Travelport Defendants state:

> Travelport has spent considerable time, money and effort over the past month re-reviewing thousands of previously withheld documents, including all 325 "exemplars" listed in [American's] April 6 Motion to Compel plus hundreds of additional documents not specifically referenced in that motion. Travelport has produced approximately 1,500 of these documents to [American], and has amended its privilege log with respect to hundreds more. In short, Travelport has carefully reviewed and fully addressed the issues raised in [American's] April 6 Motion. Accordingly, [American's] Amended Motion should be denied as moot.

(Defs.' Resp. at 8-9). The Travelport Defendants further state, "Travelport's efforts to resolve this dispute aside, the arguments that [American] raises in its Amended Motion are completely meritless." (Defs.' Resp. at 9.)

In an order dated May 29, 2012, the Court ordered the Travelport Defendants to produce *in camera* one hundred exemplar documents in the Travelport Defendants' privilege log that had been designated by American. On June 8, 2012, the Travelport Defendants produced sixty-six of the one hundred exemplar documents for the Court's review.[4] As to the other forty-four documents,[5] the Travelport Defendants included a letter dated June 8, 2012 to the Court indicating that they had withdrawn their claims of privilege as to these documents and had produced such documents to American in full or redacted form. The Travelport Defendants stated:

> In preparing this submission, Travelport discovered that its privilege determination standards were not applied consistently across each document on Travelport's privilege log. The problems in consistently applying the applicable standard for privilege assertions affected both Travelport's initial privilege determinations and Travelport's re-review of documents challenged by American Airlines. Travelport will thus undertake a full review of each document on its

[4]The Court appreciates the efforts the Travelport Defendants took in submitting their *in camera* documents in a manner and with sufficient explanation to make the Court's review of such documents less difficult.

[5]The Court notes that the Travelport Defendants also submitted these documents to the Court.

privilege log to identify any documents that should be produced in full or redacted form and to identify any log entries that require modification.

Because the errors that Travelport identified are in the nature of execution and not in Travelport's interpretation of the law, Travelport will continue to apply the standards for asserting privilege that were explained in Travelport's opposition brief, some of which are disputed by AA. (*Compare* Travelport Opp. [Doc. 320] at 9-17, *with* AA Reply [Doc. 328] at 5-9 (disputing *inter alia* interpretation of the common-interest and related-companies doctrines).) Should the Court determine that Travelport's interpretation of the law is correct, AA's motion is moot, as Travelport has already begun to re-review each document on Travelport's entire privilege log. However, if the Court disagrees with any of Travelport's interpretations of the law, Travelport will of course re-review its documents consistent with the Court's guidance.

(Travelport Defendants' June 8, 2012 letter to the Court ("June 8, 2012 letter") at 1-2.)[6]

II. DISCUSSION

Federal Rule of Civil Procedure ("Rule") 26(b)(1) permits parties to "obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense." "Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence." Fed. R. Civ. P. 26(b)(1). However, a court may limit discovery if the "burden or expense of the proposed discovery outweighs its likely benefit." Fed. R. Civ. P. 26(b)(2)(C)(iii). "A party seeking discovery may move for an order compelling an answer, designation, production, or inspection." Fed. R. Civ. P. 37(a)(3)(B). A court, however, should not compel the production of privileged documents. Fed. R. Civ. P. 26(b)(1).

[6]The Court notes that American submitted a copy of the Travelport Defendants privilege log with its motion to compel. (*See* Pl.'s Appendix in Support ("Pl.'s App.") at Ex. 1.) American divided the privilege log and the corresponding exemplars into four sections based on four arguments it raised as to why the exemplars were not privileged. However, the "re-reviewed" privilege log that the Travelport Defendants submitted to the Court with their *in camera* documents is significantly revised and, thus, the Court reviewed each entry of the privilege log individually to determine which of American's four arguments applied to each exemplar.

Th attorney-client privilege protects two types of communications: (1) confidential communications made by a client to his lawyer for the purpose of obtaining legal advice; and (2) any communication from an attorney to his client when made in the course of giving legal advice, whether or not that advice is based on privileged communications from the client. *United States v. Mobil Corp.*, 149 F.R.D. 533, 536 (N.D. Tex. 1993) (citing *In re LTV Securities Litigation*, 89 F.R.D. 595, 600-03 (N.D. Tex. 1981)). "To invoke the attorney-client privilege, the claimant must establish the following elements: (1) the asserted holder of the privilege is or sought to become a client; (2) the person to whom the communication was made is (a) a member of a bar of a court, or his subordinate, and (b) in connection with this communication is acting as a lawyer; (3) the communication relates to a fact of which the attorney was informed (a) by his client (b) without the presence of strangers (c) for the purpose of securing primarily either (i) an opinion on law or (ii) legal services (iii) or assistance in some legal proceeding, and (d) not for the purpose of committing a crime or tort; and (4) the privilege has been (a) claimed and (b) not waived by the client." *Mobil Corp.*, 149 F.R.D. at 536 (citing *In re LTV Sec. Litig.*, 89 F.R.D. at 600; *see U.S. v. Kelly*, 569 F.2d 928, 938 (5th Cir. 1978).[7] Communications between a corporation, any corporate employee, and its inside or outside counsel are protected by the attorney-client privilege "when the communications concern matters within the scope of the employee's corporate duties and the employee is aware that the information is being furnished to enable the attorney to provide legal advice to the corporation." *Mobil Corp.*, 149 F.R.D. at 537. The party claiming the privilege bears the burden of proving that the privilege exists. *In re Santa Fe Int'l Corp.*, 272 F.3d 705, 710 (5th Cir. 2001); *United States v. Kelly*, 569 F.2d at 938.

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[7]Federal common law governs the resolution of privilege determinations because in this case the existence of a federal question provides the basis for federal subject-matter jurisdiction. *See United States v. Zolin*, 491 U.S. 554, 562 (1989).

A. Communications With Blackstone

The first category of communications that American claims were improperly withheld are those communications that the Travelport Defendants shared with third-party Blackstone. American argues there is no protection under the attorney-client privilege that protects communications between the Travelport Defendants and Blackstone, a third-party and the Travelport Defendants' alleged parent company and majority owner at the time the disputed communications were made. (Pl.'s Mot. at 12.) American argues that case law does not support the Travelport Defendants' "blanket assertion that corporations related through common ownership are treated as one entity with respect to the attorney client privilege and do not need to establish a substantial identi[t]y of legal interest to assert the privilege." (Pl.'s Mot. at 15.) American also argues that "Travelport is ***not*** a wholly owned subsidiary of Blackstone, and therefore the cases that Travelport has previously cited are inapposite and do not support Travelport's assertion that its communications with Blackstone are privileged." (*Id.*)

The Travelport Defendants claim, on the other hand, that the attorney-client privilege does protect communications between "'the corporation who retained an attorney, its parent, and its wholly-owned and *majority-owned subsidiaries*.'" (Defs.' Resp. at 12 (quoting *Weil Ceramics & Glass, Inc. v. Work*, 110 F.R.D. 500, 503 (E.D.N.Y. 1986)).) Travelport claims that the withheld communications with its corporate parent Blackstone ranging from April 15, 2007 to September 23, 2011 are protected by the attorney-client privilege because, during this period, "Blackstone owned more than 70% of Travelport Limited, which in turn owned 100% of Travelport, L.P." (Defs.' Resp. at 12-13.; *see, e.g.*, Defendants' Appendix in Support of Response ("Defs.' App.") at 79-80.)

After reviewing the Travelport Defendants' amended privilege log submitted to the Court with its *in camera* documents, it appears that there are twelve exemplars[8] that fall within this category, exemplar numbers 2, 3, 8, 10, 11, 14, 16, 19, 23, 25, 26, and 40. According to the Travelport Defendants' privilege log, all but one of these exemplars contain communications between Travelport agents, directors, employees, in-house counsel, and/or outside counsel and Blackstone employees, directors, in-house counsel and/or outside counsel ranging from April 19, 2007 through May 26, 2011.[9]

The first issue is whether the attorney-client privilege itself applies to these exemplars. The Court finds that it does apply to all exemplars except exemplar numbers 8 and 16. As to exemplar 8, it is not protected by the attorney-client privilege because there does not appear to be any attorney involved in the email exchange.[10] As to exemplar 16, it is not protected by the attorney-client privilege because the redacted sentence contained within cannot be viewed as a

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[8] The Court notes that exemplar 10 falls under the "common interest" exception category as well, which will be discussed infra.

[9]Exemplar 10, which Travelport claims is protected by the attorney-client privilege as well as the "common-interest" exception, is allegedly an email exchange between Blackstone's outside counsel, Orbitz's in-house counsel, and Travelport's in-house counsel.

[10]The Court notes that in the "Supplemental Attorney/Legal Reference" column of their privilege log, it contains the notation "('Travelport legal')". The Travelport Defendants explain the "Supplemental Attorney/Legal Reference" column as follows:

> The "Supplemental Attorney/Legal Reference" column lists information not otherwise captured in the log that nevertheless appears in the content of the document (or its metadata) and supports the privilege claim (*e.g.* the names of attorneys or law firms, or certain words or phrases such a[s] "legal" or "prepared for counsel"). If a privileged document were to include an "attorney-client communication" legend, for instance, the phrase "attorney-client communication" would generally appear in the Supplemental Attorney/Legal Reference column for that document. Similarly, if a privileged communication referred to an attorney who was not personally involved in the communication itself, that attorney's name would appear in the Supplemental Attorney/Legal Reference column.

(Explanation of Materials--Volume 1 at 1 in the documents submitted *in camera* to the Court.) The Court, however, does not find any indication in exemplar 8 that it contained communication made to anyone in "Travelport legal."

confidential communication made for the purpose of securing primarily either (i) an opinion on law or (ii) legal services (iii) or assistance in some legal proceeding. Instead, it is merely a statement that the Travelport Defendants have sought legal advice regarding certain agreements. Consequently, American's motion to compel is GRANTED as to exemplars 8 and 16.

The next issue is whether the attorney-client privilege was waived as to the other exemplars in this category because they were shared with Blackstone employees, directors, in-house counsel, and/or outside counsel. The Supreme Court in *Upjohn v. United States*, 449 U.S. 383, 389-97 (1981) rejected a mechanistic approach to the application of the attorney-client privilege in the corporate setting in favor of a case-by-case evaluation to determine whether application of the privilege would further the underlying purpose of the privilege. Contrary to American's arguments, the Court finds that "corporations related through common ownership or control are treated as one entity for attorney-client privilege purposes." *Pasadena Refining Sys. Inc. v. United States*, No. 3:10-CV-0785-K(BF), 2011 WL 1938133, at *2 (N.D. Tex. Apr. 26, 2011). This exception to waiver of the attorney-client privilege is sometimes referred to as the "related companies exception" and applies "wherein the corporation which retained the attorney, its parent, and its subsidiaries are considered the same person for purposes of the privilege." *Zapata Gulf Marine Corp. v. Puerto Rico Maritime Shipping Auth.*, No. 86-2911, 1989 WL 149227, at *2 (E.D. La. Dec. 5, 1989); *see United States v. Am. Tel. and Tel. Co.*, 86 F.R.D. 603, 616 (D.D.C. 1979) (stating that the attorney-client protection provided for corporate clients includes the corporation who retained an attorney, its parent, and its wholly-owned and majority-owned subsidiaries collectively).[11] "The purpose of the attorney-client privilege is to 'encourage

[11] *But see Mitsui Sumitomo Ins. Co. v. Carbel, LLC*, No. 09-21208-CIV, 2011 WL 2682958, at *4 (S.D. Fla. July 11, 2011) (stated that the "common interest exception" to the waiver of the attorney-client privilege applied to the disclosure of privileged communication shared between a parent corporation and a subsidiary when the parent and

frank and full communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice.'" *Mobil Corp.*, 149 F.R.D. at 547 (quoting *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981)).[12]

Furthermore, contrary to American's arguments, the Court finds that the fact that the Travelport Defendants are not wholly-owned subsidiaries of Blackstone does not change the fact that the communications it shared with Blackstone are privileged. Although there are some cases that appear to lend support to American's position,[13] the Courts finds that the more reasoned view, at least based on the facts of this case, is that disclosure of communications between a parent and

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subsidiary *shared a legal interest*); *Gulf Islands Leasing, Inc. v. Bombardier Capital*, 215 F.R.D. 466 474 (S.D.N.Y. 2003) ("The mere existence of an affiliate relationship does not excuse a party from demonstrating the applicability of the common interest rule."); *Hohenwater v. Roberts Pharm. Corp.*, 152 F.R.D. 513, 517 (D.S.C. 1994) (finding, *inter alia*, that corporate defendant waived attorney-client privilege with respect to memorandum prepared by its representatives and its attorneys in preparation for litigation by revealing content of document to employee of its wholly owned subsidiary, where employee was not party to litigation).

[12]In this Court's view, this is a different factual situation and standard than when two unrelated corporations are claiming the attorney-client privilege for communications between their respective counsel, which is known as the "common interest" exception to waiver of the attorney-client privilege and is discussed, *supra,* at pages 10-12. The Court in *Music Sales Corp. v. Morris*, No. 98CIV.9002(SAS)(FM), 1999 WL 974025, at *7 (S.D.N.Y 1999), explaining the difference in the common interest and related companies exceptions to the attorney-client privilege, stated:

> Although the Defendants' cases each address the applicability of the common interest doctrine, they plainly deal with two separate factual situations, which are subject to different legal standards and, consequently, may lead to different results. As the cases show, *unrelated* corporations cannot claim the attorney-client privilege for communications from counsel which they have shared with each other unless they have a substantial identity of legal interest. Corporations which are related through common ownership or control, however, need not meet this strict standard. Rather, such inter-related corporate communications' are treated 'in the same manner as intra-corporate communications. Corporations consequently can demonstrate sufficient interrelatedness to be treated as one entity for attorney-client privilege purposes if they *either* are closely affiliated *or* share an identity of legal interest.

Id. at *7 (internal citations and quotations omitted).

[13]*See, e.g., Guy v. United Healthcare Corp.*, 154 F.R.D. 172, 177-78 (S.D. Ohio 1993) ("The disclosure of otherwise privileged materials to a parent by a wholly owned subsidiary will not result in a waiver of the attorney-client privilege); *State ex rel. Syntex Agri Business, Inc. Adolf*, 700 S.W.2d 886, 888 (Mo. Ct. App. 1985) (adopting the rule from *Insurance Company of North America v. Superior Court for the County of Los Angeles*, 108 Cal. App. 3d 758 (1980), that "at least in the instance of wholly-owned subsidiaries and affiliates, . . . the presence of a representative of a parent or affiliated company at a legal briefing of a subsidiary, and vice versa, does not destroy confidentiality of communication between counsel and client").

its majority-owned subsidiaries does not result in waiver of the attorney-client privilege. *See, e.g.*, *Weil Ceramics & Glass, Inc.*, 110 F.R.D. 500 (E.D.N.Y. 1986) (stating "the attorney-client protection provided for corporate clients, includes the corporation who retained an attorney, its parent, and its wholly-owned and majority-owned subsidiaries considered collectively); *Am. Tel. and Tel. Co.*, 86 F.R.D. at 616-18 (finding that the wholly owned and majority-owned subsidiaries of AT&T but not the minority-owned companies and formerly affiliated companies were considered the "client" for attorney-client purposes). Consequently, American's motion to compel as to the remaining exemplars in this category is DENIED. Thus, as to all other similar documents withheld by the Travelport Defendants, the attorney-client privilege will be upheld as long as all elements of the attorney-client privilege are present, including that the communication involved an attorney and contained a confidential communication.

B. Communications With Orbitz

The second category of documents that American claims were improperly withheld are those shared with Orbitz, one of the co-defendants in this case. American claims that "Travelport improperly withheld numerous communications with its co-defendant Orbitz, many of which occur *two and a half years* before the instant litigation was filed." (Pl.'s Mot. at 13.) The Travelport Defendants, however, argue that these documents are protected under the "common interest" exception to the general rule that the attorney-client privilege is waived when privileged information is disclosed to a third party. (Defs.' Resp. at 9.) The Travelport Defendants claim that all but one of the documents they are claiming as privileged under the common interest exception post-date September 2010, which is the month Travelport and Orbitz allegedly negotiated and executed a Common Interest Agreement in anticipation of litigation against certain airlines, including American. (Defs.' Resp. at 10.)

"The . . . common interest rule[] is an extension of the attorney-client privilege which 'serves to protect the confidentiality of communications passing from one party to the attorney for another party where a joint defense effort or strategy has been decided upon and undertaken by the parties and their respective counsel.'" *United States v. Agnello*, 135 F. Supp. 2d. 380, 382 (E.D.N.Y. 2001) (quoting *United States v. Schwimmer*, 892 F.2d 237, 243 (2d Cir. 1989)). There are two types of communications protected under the common interest exception: (1) communications between co-defendants in actual litigation and their counsel and (2) communications between potential co-defendants and their counsel in which there is a "palpable threat of litigation at the time of the communication."[14] *In re Santa Fe Int'l Corp.*, 272 F.3d at 710-11.

According to Plaintiff, the originally-designated exemplars that deal with the issue of whether the common interest exception applies are exemplars 27 through 49. (*See* Ex. 1 of Plaintiff's Appendix in Support of its Motion to Compel Documents.) After the Travelport Defendants' re-review of these exemplars, there are, however, only six exemplars, exemplars 10, 43, 45, 46, 47, and 48,[15] that the Travelport Defendants continue to maintain fall within the common interest exception. On the other hand, the Travelport Defendants represent that they negotiated and executed a Common Interest Agreement in September 2010 with Orbitz in anticipation of litigation against certain airlines, including American. (Defs.' Resp. at 10.)[16] Thereafter, in November 2010, American sued the Travelport Defendants in Texas state court and

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[14]"To be eligible for continued protection, the communication must be shared with the *attorney* of the community of interest." *In re Teleglobe Communications Corp.*, 493 F.3d 345, 364 (3d Cir. 2007).

[15]The Court notes that the Travelport Defendants claim that exemplars 46, 47, and 48 are also protected by the work-product doctrine.

[16]The Travelport Defendants claim that the Common Interest Agreement is privileged and offered to produce a copy for the Court. (Defs.' Resp. at 10 n.11.) To allow the Court to have a complete record on this issue, the Court requests that the Travelport Defendants submit a copy of this agreement to the Court for *in camera* review.

later filed counterclaims against the Travelport Defendants in Illinois state court. (Defs.' Resp. at 10.) American filed the instant action in this Court on April 12, 2011.

After reviewing the six exemplars in this category, the Court finds that the common interest exception does apply to all exemplars as they all post-date September 2010, the date on which the Travelport Defendants signed a Common Interest Agreement with Orbitz and are communications between co-defendants in actual litigation and their counsel. Consequently, American's motion to compel the production of these documents is DENIED. For all other documents that meet the same criteria as these exemplars, the Court's ruling is the same.

C. Remaining Exemplars

The third category of documents that American claims were improperly withheld based on the attorney-client privilege are those that appear to discuss "purely business matters." (Pl.'s Mot. at 16-18.) American argues that the Travelport Defendants' privilege log contains hundreds of documents that purport to discuss "contract negotiations" and should have been produced. (Pl.'s Mot. at 16.) American claims that many of the documents do not appear to even involve an attorney. (*Id.*) "American suspects that [many of] these documents discuss or reflect Travelport's improper coordination with other [global distribution systems]--*through trade organizations*--to further the [global distribution systems'] anticompetitive business objectives." (Pl.'s Mot. at 17.)

The Travelport Defendants argue, however, that they have "withheld or redacted such documents only to the extent that they *reflect legal advice or requests for the same.*" (Defs.' Resp. at 13.) The Travelport Defendants claim "[t]hat such advice may concern contraction negotiations or other business matters in no way alters its privileged status." (Defs.' Resp. at 13.)

The fourth category of documents that American claims were improperly withheld are those in which American alleges that no attorneys are associated with the documents. (Pl.'s Mot. at 18-19.) American argues that "it appears that in submitting its revised log, Travelport merely added a work product claim to many of the documents not associated with any attorney in an attempt to shield them from discovery." (Pl.'s Mot. at 18.) The Travelport defendants, however, claim that it is not necessary under the work product doctrine for an attorney to be directly involved in a communication for that communication to be privileged as long at "they reflect or refer to legal advice, or if prepared in anticipation of litigation." (Defs.' Resp. at 17; *see* Defs.' Resp. at 15-17.)

As noted above, the attorney-client privilege "attaches only to communications made for the purpose of giving or obtaining legal advice or services, not business or technical advice or management decisions." *Stoffels v. SBC Commc'ns, Inc.*, 263 F.R.D. 406, 411 (W.D. Tex. 2009). In addition, the work-product doctrine protects "documents and tangible things that are prepared in anticipation of litigation or for trial by or for another party or its representative." Fed. R. Civ. P. 26(b)(3). The work product doctrine applies "not merely as to materials prepared by an attorney, but also as to materials prepared in anticipation of litigation or preparation for trial by or from a party or any representative acting on his behalf." Fed. R. Civ. P. 26(b)(3) 1970 amendment advisory committee notes. Litigation is not required to be imminent for documents and tangible things to be prepared in anticipation of litigation. *In re Kaiser Aluminum and Chem. Co.*, 214 F.3d 586, 593 (5th Cir. 2000). To qualify as work product where litigation is not imminent, the "primary motivating purpose" behind the creation of the document must have been to aid in possible future litigation. *Performance Aftermarket Parts Group, Ltd. v. TI Group Auto Sys., Inc.*, Civ. Action No. H-05-4251, 2007 WL 1428628, at *2 (S.D. Tex. May 11, 2007)

(quoting *In re Kaiser*, 214 F.3d at 593). In addition, work-product protection is not waived just because certain documents are disclosed to third parties. *Advanced Technology Incubator, Inc. v. Sharp Corp.*, No. 2:07-CV-468, 2009 WL 4432569, at *3 (E.D. Tex. July 29, 2009)

After reviewing each of the remaining exemplars, the Court concludes that these documents are privileged as claimed by the Travelport Defendants pursuant to either the attorney-client privilege and/or the work product doctrine as they have met the standards set forth above. Consequently, the Court concludes that American's motion to compel as to these exemplars is DENIED.

III. CONCLUSION

Based on the foregoing, it is **ORDERED** that American's Combined (I) Amended Motion to Compel Production of Documents Wrongfully Withheld Under the Guise of Privilege by the Travelport Defendants, and (II) Motion for Leave to File Supplemental Amended Motion [doc. # 316] is **PARTIALLY GRANTED** in that the Travelport Defendants must produce without redaction exemplars 8 and 16 to American **no later than 4:30 p.m. on Friday, July 20, 2012.**

It is further **ORDERED** that the Travelport Defendants shall complete its document by document review of all documents on its privilege log, including re-reviewing all entries in its privilege log to ensure they are consistent with this order, **no later than 4:30 p.m. on Friday, July 20, 2012** and produce any further non-privileged documents **no later than 4:30 p.m. on Tuesday, July 24, 2012**.

It is further ORDERED that the Travelport Defendants shall deliver to the undersigned's chambers, no later than **4:00 p.m. on Friday, July 20, 2012,** a copy of the Common Interest Agreement it signed with Orbitz in September 2010 for *in camera* review by the Court.

It is further **ORDERED** that American's request to file an amended motion as to any remaining disputed matters be extended to May 21, 2012 is **DENIED AS MOOT** as such deadline has already passed and American did not file any amended motions.

All other relief not granted herein is **DENIED**.[17]

SIGNED July 16, 2012.

JEFFREY L. CURETON
UNITED STATES MAGISTRATE JUDGE

JLC/knv

[17]The parties should note that the Court has grown weary of the discovery tactics being used in this case and the proliferation of discovery disputes and motions that have been filed, many of which have resulted in the unnecessary expenditure of limited judicial resources. With regard to this particular motion, the Court finds the Travelport Defendants' treatment of its privilege log suspect and its claim in its response to American's Amended Motion that it had "carefully reviewed" its privilege log to be disingenuous, at best, especially in light of the Travelport's recent admission that it has "discovered that its privilege determination standards were not applied consistently across each document on Travelport's privilege log." (June 8, 2012 letter.) The Court cannot fathom why it took the filing of two motions to compel and the Court's order for the production of *in camera* documents for the Travelport Defendants to finally realize that there were major problems with their privilege log and decide to produce over forty percent of the one hundred exemplars the Travelport Defendants had previously claimed were privileged. Each time the Travelport Defendants amend or re-review their privilege log to correct errors, this results in additional burdens being placed on American (and, in turn, on the Court). The parties are on notice that continued obstinance in good faith discovery participation and/or any failures to try to strictly comply with the principles set forth in *Dondi Properties Corp. v. Commerce Savings & Loan Assoc.*, 121 F.R.D. 284 (N.D. Tex. 1988) (en banc), will be viewed very unfavorably by the Court.